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# Rhetorical Ruckus or Supranational Legal Threat? A Comparative Analysis of Far-Right Populism in Central and Eastern European Member States of the European Union and its Supranational Legal- Institutional Consequences

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# Rhetorical Ruckus or Supranational Legal Threat? A Comparative Analysis of Far-Right Populism in Central and Eastern European Member States of the European Union and its Supranational Legal-Institutional Consequences

## **Abstract**

Many states around the globe, most particularly in Europe, have seen a resurgence of far-right populist parties in the years following the global financial crisis. In Central and Eastern Europe (C.E.E.), the domestic democratic backsliding exhibited by European Union Member States such as Hungary under the administration of Fidesz's Viktor Orbán and Poland under the control of Law and Justice's Mateusz Morawiecki have prompted many scholars and political observers to predict the worst for the European Union. However, while domestic sliding towards authoritarianism and a flouting of rhetorical norms is cause for alarm, the effect of right-wing populism on the supranational legal architecture of the European Union is drastically understudied. Through complementary comparative analyses of [1] the prosecution of non-compliant Member States over time and [2] a comparative case study of Poland and Hungary, this paper hopes to expand a contending view in the literature that is currently understated. The study concludes that the legal-institutional architecture of the E.U. is doing precisely what it was designed to do, and warnings of the demise of the European integration project in light of political trends in C.E.E. may be overstated.

## **Keywords**

European Union, democratic backsliding, populism, far-right, Poland, Hungary, international law, compliance, Political Science, Social Sciences, Rudra Sil, Sil, Rudra

## **Disciplines**

Comparative Politics | Eastern European Studies

# RHETORICAL RUCKUS OR SUPRANATIONAL LEGAL THREAT?

A Comparative Analysis of Far-Right Populism in Central and Eastern European Member States  
of the European Union and its Supranational Legal-Institutional Consequences

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Senior Honors Thesis in Political Science

University of Pennsylvania

Spring 2019

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## ACKNOWLEDGEMENTS

Feeling a member of the political science disciplinary community, and knowing that I have—in my own, small, undergraduate way—contributed to knowledge in the field is a gift I will cherish from my time at Penn. However, none of this research would have been possible without the four years of guidance and mentorship I have been fortunate enough to receive from Dr. Rudra Sil. Professor Sil has been by my side every step of my academic career. His course in the Fall of 2015, Political Change in the “Third World,” opened my eyes to the wonders of political science through a comparative lens. His willingness to grant me an internship under his tutelage in the Summer of 2016 introduced me to the world of academic research. And his role as my thesis advisor since May 2018 has proven that he is one-of-a-kind. Rudra Sil has written more recommendation letters than I can count, has answered hours of my questions—both pertaining to the research I have conducted for him and not—and has been my “go to” ever since that first political science course my freshman fall. I cannot thank him enough. The political science department would be nothing without the work and dedication of Dr. Eileen Doherty-Sil. Dr. D manages to simultaneously uplift her thesis students and ground them, listen attentively and advise fiercely, and foster an environment that is as no-nonsense as it is fun and supportive—no easy feat in academia. She has perfected the role of academic leadership. I would also like to thank the other academic mentors who have guided me through my time at the University of Pennsylvania: Professor Julia Lynch, Dr. Michelle Mabel Pinto, and Dick Polman all foster in their students a sense of inquiry that cannot be extinguished.

Finally, I would like to thank my parents. None of my achievements would be conceivable without their incessant love and support, and I owe them all the gratitude in the world.

**ABSTRACT**

Many states around the globe, most particularly in Europe, have seen a resurgence of far-right populist parties in the years following the global financial crisis. In Central and Eastern Europe, the domestic democratic backsliding exhibited by European Union Member States such as Hungary under the administration of Fidesz's Viktor Orbán and Poland under the control of Law and Justice's Mateusz Morawiecki have prompted many scholars and political observers to predict the worst for the European Union. However, while domestic sliding towards authoritarianism and a flouting of rhetorical norms is cause for alarm, the effect of right-wing populism on the supranational legal architecture of the European Union is drastically understudied. Through complementary comparative analyses of [1] the prosecution of non-compliant Member States over time and [2] a comparative case study of Poland and Hungary, this paper hopes to expand a contending view in the literature that is currently understated. The study concludes that the legal-institutional architecture of the E.U. is doing precisely what it was designed to do, and warnings of the demise of the European integration project in light of political trends in C.E.E. may be overstated.

## INTRODUCTION

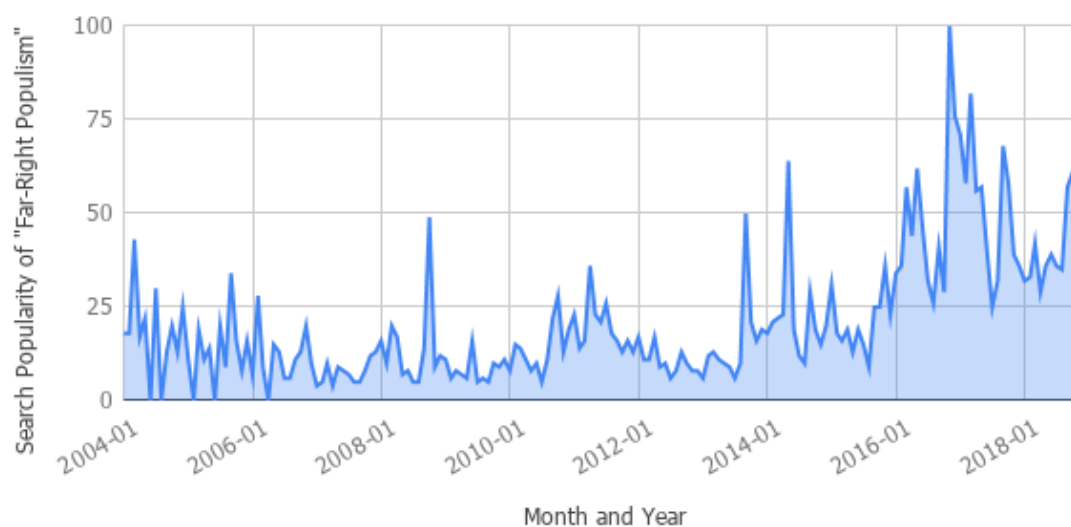
The fall of the Soviet Union and the accession of many former Soviet Eastern and Central European states to the ranks of the European Union in the early 2000s seemed to signify the realization of Francis Fukuyama's 1992 *The End of History and the Last Man*. In the years following the 2008 global financial crisis, however, Fukuyama's theory has come into question as states once considered established democracies deviate from the liberal democratic and economic tenets espoused by the liberal world order and the institutions that comprise it. In the context of Central and Eastern Europe (henceforth C.E.E.), specifically calling to mind Hungary under the administration of Fidesz's Viktor Orbán and Poland under the administration of Law and Justice's Mateusz Morawiecki, many political scientists, news analysts, commentators, and politicians have used the term "right-wing populism" to describe the admittedly worrisome political trends of the region. Figure 1 shows the steady rise in Google search popularity of the term "far-right populism" and its variants, with a notable peak in November 2016—the time at which Donald Trump was elected president of the United States. It has also become fashionable for academics to use the term "democratic backsliding" to characterize the rise of far-right populist parties and their ascension to the ranks of power in those nations; however, more context is needed before making broad, apocalyptic sweeps about the decline of liberalism in the West as a result. Granted, the anti-globalization, anti-E.U., xenophobic, and racist rhetoric championed by rulers such as Orbán, Law and Justice leader and co-founder Jarosław Aleksander Kaczyński, and Austria's Vice-Chancellor Heinz-Christian Strache are worrisome and damaging to the norms of the E.U. as an institution. But flouting rhetorical norms and violating legal agreements are two different spheres of political science. While the erosion of democratic norms on the *domestic* level is an undoubtedly troubling phenomenon, the

degradation of the legal-institutional integrity of the Union is dependent upon European national leaders choosing to deviate from, and violate, the E.U. rules and regulations to which their predecessors committed. This paper—unlike many which conflate the degradation of domestic democratic norms and a degradation of the *supranational* liberal democratic order—seeks to investigate the extent to which far-right populist leaders in C.E.E. have made the choice to flout international legal obligations.

Figure 1<sup>1</sup>

### Search Term Interest of "Far-Right Populism"

Relative to the highest point on the chart. A value of 100 is the peak popularity.



<sup>1</sup> "Far-Right Populism Search Interest." Google Trends. December 2018.  
<https://trends.google.com/trends/explore?date=all&q=/m/0270h96>.



## Democratic Backsliding: A Death Sentence for the E.U.?

The question of whether or not the authoritarian tendencies of many E.U. Member States in C.E.E. threatens the legal integrity of the Union is one which will be explored in depth in this study. This introductory section therefore aims to fulfill two goals: [1] introduce the narrative espoused by many scholars that democratic backsliding is a disaster for the E.U. as an institution, and [2] generally outline the threat posed, at the domestic level, to Member States currently ruled by populist radical-right parties. Both will help to contextualize the overarching question of the study, which hopes to uncover whether the right-wing populist trends toward authoritarianism on the national stages of C.E.E. necessarily signal the weakening of the international legal apparatus of the European Union. Table 1 shows the ubiquity of far-right populist parties in national governing coalitions by Member State since their accession to the Union. Highlighted bars indicate Member States where far-right parties currently have enough electoral support to be included in national governing coalitions. In March of 2019, that figure stood at eight of the 28 Member States that comprise the E.U.. Figure 2, from *Der Spiegel*, geographically illustrates the presence of right-wing populists in governing coalitions, as well as the presence of far-right populist parties in national parliaments.

Table 1<sup>2</sup> *Far-Right Populist Parties in E.U. Member States' National Governing Coalitions*

Country	Party	Time Period(s)	Coalition Partners (Party Ideology)
Austria	FPÖ	2000-02	ÖVP (Christian democratic)
		2002-05	ÖVP
	BZÖ	2005-2007	ÖVP

<sup>2</sup> Table 1 is adapted from Table 12.1 in: Cas Mudde. *Populist Radical Right Parties in Europe*. (Cambridge University Press: Cambridge, 2009), 280.

	FPÖ	2017-	ÖVP
Bulgaria	GERB	2009-13	
		2014-17	RB (center-right)
		2017-	United Patriots (nationalism, populism)
Finland <sup>3</sup>	PS	2015-	KESK (liberal, agrarian) and KOK (center-right)
Hungary	Fidesz	2010-	KDMP (Christian democratic)
Italy	LN	1994	FI (neoliberal populist) and AN (radical right)
		2001-05	FI, AN (conservative) and MDC Christian democratic)
	M5S-LN	2018-	M5S (populist) and LN (radical right)
Latvia <sup>4</sup>	NA and KPV LV	2019-	JV (center-right), JKP (conservative), AP! (social and economic liberalism)
Netherlands <sup>5</sup>	LPF	2002-2003	CDA (Christian democratic), VVD (center-right)
Poland	LPR	2006-2007	PiS (conservative) and Samoobrona (social populist)
	PiS	2015-	
Slovakia <sup>6,7</sup>	SNS	2006-10	SMER (social populist) and HZDS
	SNS	2016-18	SMER, Most-Híd, and SIEĽ (center-right)
	SNS	2018-	SMER and Most-Híd
Slovenia <sup>8</sup>	SDS	2004-08	NSI (Christian democratic), SLS (conservative), and DeSUS (pensioners issues)
	SDS	2012-13	NSi, SLS, DeSUS, and DL (liberal)

<sup>3</sup> "Parliamentary Elections 2015 - Results - Yle.fi." Parliamentary Elections 2015 in Finland.

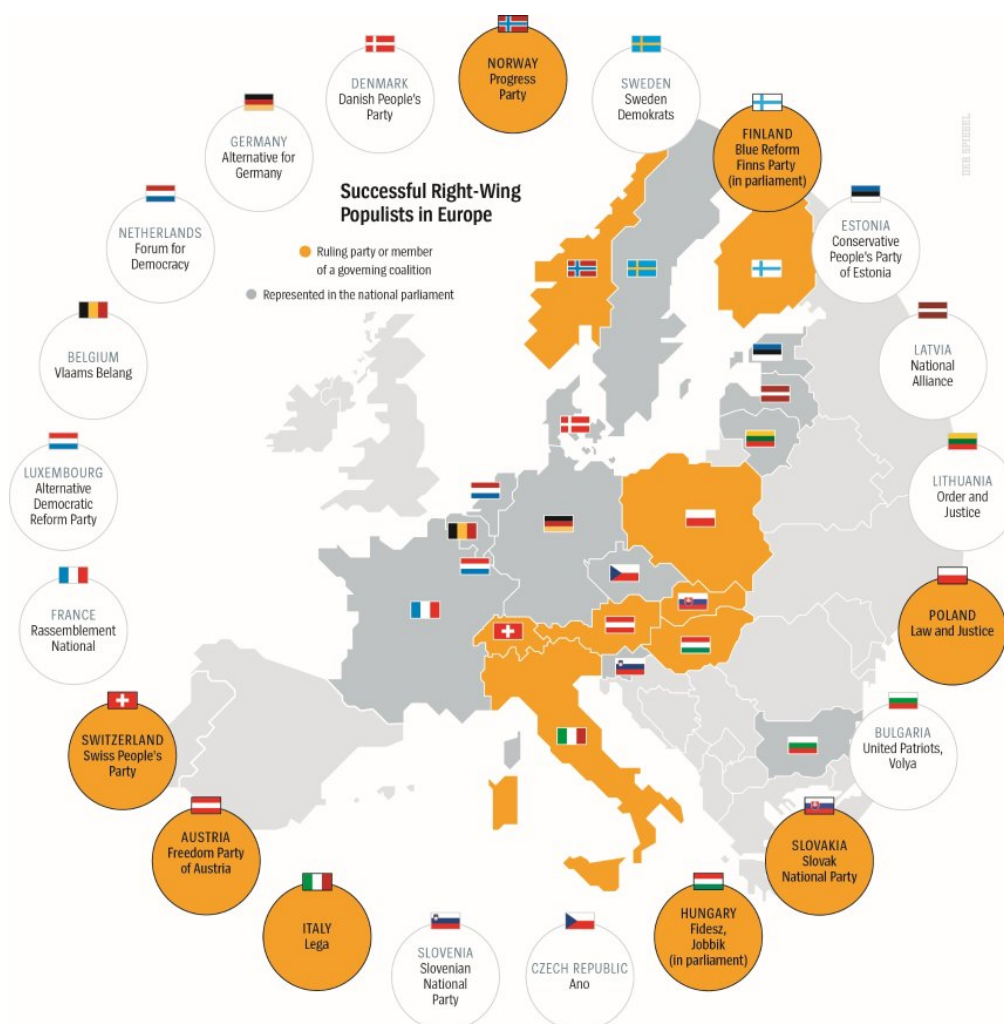
<sup>4</sup> "Lai Izmantotu šo Vietni, Lūdzu, Ieslēdziet Javascript Savā Pārlūkprogrammā!" Sv2018.cvk.lv.

<sup>5</sup> K. Gladdish. "The 2002 Dutch Election: A Populist Coup," *Dutch Crossing*, (2016) 26:1, 3-8.

<sup>6</sup> T. Haughton and M. Rybář. "A Change of Direction: The 2006 Parliamentary Elections and Party Politics in Slovakia." *Journal of Communist Studies and Transition Politics* (2008): 232-55.

<sup>7</sup> Jancarikova, Tatiana. "Slovakia's Ruling Party Wins Regional Elections but Support Shrinks after Journalist's Murder." *Reuters*, November 11, 2018.

<sup>8</sup> "European Elections Database. Slovenia Parliamentary Elections." Norwegian Centre for Research Data.

Figure 2<sup>9</sup>

One need not look deep into the literature for the following fact to emerge: many researchers, European bureaucrats, policy-makers, and pro-European national officials expect the worst. Democratic backsliding and the rise of extreme-right populist parties, they say, is detrimental to the future of the European integration project. According to a Bloomberg report, which analyzed election results from 22 states across the European continent, “support for populist radical-right parties is higher than it’s been at any time over the past 30 years. These parties won 16 percent of the overall vote on average in the most recent parliamentary election in

<sup>9</sup> "Right-Wing Populist Parties in Europe." Map. *Spiegel Online*. January 4, 2019.

each country, up from 11 percent a decade earlier and 5 percent in 1997.”<sup>10</sup> As a result of said trends, the report concludes that “the future of the European Union may be at stake.”<sup>11</sup> Similarly, a *Politico* report claimed, “Euroskeptics in the European Parliament have a plan to blow up the assembly’s politics in 2019, and radically change the EU in the process.” The analysis even goes as far to postulate, “the reform that leading Euroskeptics have in mind would amount to the wholesale destruction of the EU as currently conceived.”<sup>12</sup> A piece in *Der Spiegel* hypothesizes the threat of paralysis that right-wing governments pose to the *executive* branch of the Union (the E.C.), warning, “if several EU-critical governments were to send commissioners at the same time, it wouldn't be as easy to sideline them... a Commission with a number of commissioners and critics pulling the brakes all the time would weaken the European Union.”<sup>13</sup> The sentiment is not limited to journalists; some policymakers both at the E.U. and national levels also presume the worst for the durability of the European project in light of right-wing populism.

Jean-Claude Juncker, President of the European Commission, warned in October of 2018 (ahead of 2019’s European Parliament elections) that, “The danger looming from the right can easily gain ground when mindless populism and small-minded nationalism are paving the way.”<sup>14</sup> Similarly, in speaking about the consequences of Brexit, French President Emmanuel Macron—often regarded as the poster child for deeper European integration—said, “Retreating into nationalism offers nothing; it is rejection without an alternative. And this is the trap that

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<sup>10</sup> Tartar, Andre. "How the Populist Right Is Redrawing the Map of Europe." *Bloomberg*, December 11, 2017.

<sup>11</sup> Ibid.

<sup>12</sup> De La Baume, Maïa. "Populist Plan for 2019 Election Puts EU in Crosshairs." *Politico*, June 4, 2018.

<sup>13</sup> Amann, Melanie, Julia Amalia Heyer, Walter Mayr, Peter Müller, Dietmar Pieper, and Jan Puhl. "Europe's Right Wing Takes Aim at the EU." *Spiegel Online*, January 4, 2019.

<sup>14</sup> “Jean-Claude Juncker condemns 'mindless populism and nationalism' as support grows for anti-EU parties ahead of European parliament elections.” *Daily Mail*, October 4, 2018.

threatens the whole of Europe.”<sup>15</sup> Due to political motivations, officials’ cautionary rhetoric about the tide of right-wing populism against the tenets of liberal democracy may not come as a surprise. The environment of presumed emergency, however, also extends to the academy. De Vries and Edwards (2009), for example, deduce a cueing-effect between Euroskepticism and far-right political parties. They explain: “The cueing effect of Eurosceptic right-wing parties in mobilizing national identity against the EU is large in the case of feelings of exclusive national identity.”<sup>16</sup> Much literature on democratic backsliding, which will be reviewed below, also strikes a similar tone in its findings; however, as Mudde (2007) makes clear, “With a few notable exceptions, studies of populist radical right parties often claim significant impact upon policies (immigration) and society (violence), but provide very little empirical evidence for those claims.”<sup>17</sup>

These warnings, it must be stated, are made for good reason. Most political parties classified as “far-right populist” in nature *do* have Euro-skepticism at their ideological core. “Elitist Brussels technocrats” are denounced as far-removed from the perils of the “common” citizen, and the parties’ populist messages have gained traction with national electorates—especially since the onset of the European sovereign debt crisis in 2010. Many claim that the 2016 British referendum to leave the European Union, the 2018 Italian election of the economically populist, anti-immigrant, and Euroskeptic parties the *Lega* and *Movimento Cinque Stelle* (M5S), and most recently, the March 2019 Dutch provincial elections in which the newly-formed, right-wing populist Forum for Democracy (FvD) garnered the highest vote share, all

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<sup>15</sup> Ellyatt, Holly. "France's Macron Calls to Protect Europe against Nationalists, Foreign Powers and Manipulation." *CNBC*, March 5, 2019.

<sup>16</sup> C. De Vries and E. Edwards. "Taking Europe To Its Extremes." *Party Politics* (2009): 20.

<sup>17</sup> Cas Mudde. *Populist Radical Right Parties in Europe*. (Cambridge University Press: Cambridge, 2009), 291.

indicate a deterioration of the values that led to the European integration process, even among some of the founding members of the bloc.<sup>18</sup>

*The Right-Wing Populist Threat Beyond Europe.* Far-right populists have not only made electoral victories in the post-Soviet states of C.E.E., or in Europe more broadly. The trend of globalization and economic stagnation inclining disgruntled voters to propel far-right parties and leaders into power is a global one. In Brazil, for example, Jair Bolsonaro was elected president despite his history on the fringes of political life, where he praised the decades-long Brazilian military dictatorship and vocalized opinions so racist, xenophobic, homophobic and misogynist that he was charged by the attorney general with inciting hatred.<sup>19</sup> In the United States, Mickey, Levitsky, and Way (2017) claim, “The election of Donald Trump... a man who has praised dictators, encouraged violence among supporters, threatened to jail his rival, and labeled the mainstream media as ‘the enemy’—has raised fears that the United States may be heading toward authoritarianism.” The Trump administration, they warn, could spearhead an erosion of American democracy into what they deem “competitive authoritarianism”—“a system in which meaningful democratic institutions exist yet the government abuses state power to disadvantage its opponents.”<sup>20</sup> And ahead of the 2019 Knesset elections in Israel, Prime Minister Benjamin Netanyahu shocked international actors by teaming with the ultra-right-wing Jewish Power party: the “followers of late racist rabbi Meir Kahane, whose Kach movement was labelled a terrorist organisation by Israel, the United States and the European Union,” and the platform of

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<sup>18</sup> Schaart, Eline. "Far-right Populists Score Stunning Win in Dutch Provincial Vote." *Politico*, March 20, 2019.

<sup>19</sup> Londoño, Ernesto. "Right-Wing Presidential Contender in Brazil Is Charged With Inciting Hatred." *The New York Times*, April 14, 2018.

<sup>20</sup> Mickey, Robert, Steven Levitsky, and Lucan Ahmad Way. "Is America Still Safe for Democracy?: Why the United States Is in Danger of Backsliding." *Foreign Affairs*, May/June 2017.

which includes deporting Arabs from Israel.<sup>21, 22</sup> A common thread in the aforementioned cases, as well as the incidents of right-wing populist power gains in India, Turkey, and the Philippines, is an emphasis on law, order, and security justifying both executive aggrandizement and an erosion of civil liberties. Across the globe, ideologies and parties once relegated to the fringes have become mainstream, thus, this study has implications far beyond the bureaucratic buildings of Brussels and the geographic confines of Europe.

There is not a shortage of scholarly research into the economic and cultural frustrations that lead voters to sympathize with, and propel into power, far-right populist parties in the West. However, due to the relatively recent timeline of such trends, there *is* a dearth of research into whether such domestic democratic backsliding affects the legitimacy of the European Union as an institution, and whether or not Member States' domestic campaign rhetoric actually impacts compliance with E.U. regulations once these parties enter office. A puzzle therefore remains: does the rise of far-right populist parties in C.E.E. lead to countries violating E.U. regulations, or is the trend merely a domestic one without much effect on compliance with international legal obligations? Using the legal compliance architecture of the European Union as a starting point, and using Poland and Hungary as case studies, this paper will investigate that very question.

The study will proceed in five overarching sections. The first reviews the pools of scholarly literature relevant to the research question. The second, entitled "Research Design and Operationalization of Variables," outlines the two major pillars of data being analyzed, justifying both the means of indicator triangulation and case selections. The third section, "Tracking Trends in Non-Compliance," explores the number of E.C.J. court cases over time by Member

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<sup>21</sup> Kalev, Gol. "Netanyahu Might Be the Best Hope for Israel's Center-Left." *Foreign Policy*, March 25, 2019.

<sup>22</sup> "Israel Bars Far-right Candidate from Standing in Election." *France 24*, March 18, 2019. Accessed March 27, 2019.

State, employing a parallel demonstration of theories method in order to explain findings across indicators and the European Member States in question. The fourth section, “Poland and Hungary: Homogenous History and Parallel Populisms,” delves into the histories of far-right populism in Poland and Hungary, employing a most similar systems design to investigate the disparity in European institutional response to backsliding in the two countries. The final section concludes that fears of E.U. subversion by right-wing populism in C.E.E. may be overblown. Implications for theoretical conceptions of international institutions beyond the European Union are also extrapolated.

## **LITERATURE REVIEW: CAUSE FOR ALARM?**

This study will explore whether or not the rise and ascension to power of far-right populist parties in C.E.E. leads to non-compliance with European Union regulations and directives—thus addressing the larger question of whether or not, or to what extent, policymakers and neoliberal institutionalists should be concerned that said political trends erode the legal legitimacy of the European Union as an institution. There are thus three major pools of literature necessary to review: [1] research on the rise of far-right populist parties in C.E.E. (which will serve as useful case studies), [2] research on democratic backsliding—ways in which it can be defined, cases in which it can prove a useful cognitive framework, and tools which can be deployed, at the supranational level, to combat it—and [3] comparative legal research on Member State compliance with E.U. law.

As previously mentioned, there is no dearth of scholarship on the rise of far-right political parties in Europe, particularly in the countries in question: Poland and Hungary. In his 2007 book, Cas Mudde (2009) explains the seemingly perennial interest among scholarly communities



in European populism, saying, “the populist radical right is the only successful new party family in Europe”—and that was years *before* said parties rose to the highest echelons of government.<sup>23</sup> Within the field, scholars mainly employ historical and comparative case studies in order to analyze the transition of radical right-wing parties in C.E.E. from the political margins to bastions of nationalist power at the center of governments. For example, Pankowski (2010) historicizes the cultural and ideological roots of far-right populist parties in Poland, including The League of Polish Families, Self-Defense, and Law and Justice (PiS).<sup>24</sup> Similarly, and also drawing heavily on social movement literature, Mudde analyzes the theme with a pan-European scope. He argues for the term “populist radical right” to be applied to “those political parties which combine nativism, authoritarianism, and populism in their ideology.”<sup>25</sup> Mudde’s definition provides a foundation for ideological categorization in this paper. Despite similar methodology, however, one important debate remains: whether or not populism represents a coherent *ideology* in opposition to liberal democracy—as espoused by Betz and Johnson (2004), as well as Mudde (2007)—or is simply a political *style* that uses rhetoric as an emotional appeal to an electorate, with no specific or universally-applicable aims.

Mudde perfectly articulates this debate in current research when he claims “Many authors have discussed the alleged tension and even opposition between [the populist radical right and liberal democracy], but most accounts are highly abstract, referring more to general principles than concrete proposals.”<sup>26</sup> Mammone, Godin, and Jenkins (2012) express a similar sentiment, saying that the nature of said parties is often inferred from their rhetoric as opposed to their

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<sup>23</sup> Cas Mudde. *Populist Radical Right Parties*, 1.

<sup>24</sup> Rafael Pankowski. *The Populist Radical Right in Poland: The Patriots*. (Routledge: London and New York, 2010), 2.

<sup>25</sup> Ibid, 7.

<sup>26</sup> Cas Mudde. *Populist Radical Right Parties*, 7.

actions—which the authors label as differentialism.<sup>27</sup> Thus, in contrast with [1] the abstract *rhetorical* challenges to the foundational tenets of liberal democracy presented by these parties, and [2] the domestic backsliding toward authoritarianism they initiate, this study hopes to assess—through analyzing Hungary and Poland’s compliance with E.U. regulation before and after the rise of their respective far-right populist governments—the effect of their actions on the viability of the E.U. legal order.

A second bloc of research imperative to explore is that on “democratic backsliding.” One of the most important points of contention within the field of scholars who research democratic backsliding is the definition of the term around which their research coalesces. Nancy Bermeo (2016) defines democratic backsliding, “at its most basic, [as] the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy.”<sup>28</sup> Historicizing the trends in the types of democratic backsliding witnessed over time, Bermeo concludes that, while more explicit forms of backsliding like coups have experienced a downturn, states are experiencing more implicit forms of backsliding—most importantly, executive aggrandizement and strategic electoral manipulation. Her main contribution is therefore focusing on *how* democracies erode rather than *why* they erode (about which many scholars, as outlined in the previous section, have already theorized). The processes by which governments attempt to strip democracies of essential characteristics, namely, civil liberties and open political contestation, are foundational to this study.<sup>29</sup>

The remainder of the research on backsliding focuses on the methods the E.U. can take to prevent it, and the current institutional safeguards already in place within the E.U. framework; in

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<sup>27</sup> A. Mammone, E Godin, and B Jenkins. *Mapping the Extreme Right in Contemporary Europe: From Local to Transnational*. (Routledge: London and New York, 2012), 6.

<sup>28</sup> Nancy Bermeo. "On Democratic Backsliding." *Journal of Democracy* 27, no. 1 (2016): 5.

<sup>29</sup> Sil, Personal Communication, 1/2/2019.

that aspect, scholars fall into three major camps. The first camp focuses on the ability of courts, both national and supranational, to hand down more aggressive judicial rulings that counteract the effects of democratic erosion. Blauberger and Kelemen (2017) argue that the Commission is effective at rectifying larger-scale, more fundamental non-compliance by prosecuting states on firmly established, albeit technical, violations, while Kelemen (2017) also concedes that “infringement actions, with their focus on technical issues of compliance with EU law, missed the systematic nature of the Orbán regime’s attacks on the rule of law and democratic pluralism. The case-by-case approach enables the Orbán government to play legal games of cat and mouse with Brussels.”<sup>30, 31</sup> In order to counteract this deficiency in E.U. enforceability in the realm of court cases, some scholars like Scheppele (2016) advocate for a more systematic “bundling” of infringement cases brought by the European Commission against Member States allegedly not complying with E.U. law. In his response to Kelemen, Sedelheimer (2017) contends that both social pressure and material sanctions—an instrument afforded to Member States through Article 7 of the Treaty of the European Union—provide a more efficacious response to noncompliance. A third camp of scholars, exemplified by Schlipphak and Treib (2017), warn of the unintended consequences of all supranational accountability and intervention, namely, national pushback against meddling in a Member States’ domestic affairs.

Political scientists and legal scholars studying in the 1990s tended to focus on the ability of the European Union and its subsidiary supranational institutions to agenda set and, in that manner, affect Member State policy. In recent years, however, the focus has shifted from agenda-setting to the ways in which Member States implement—if at all—legally binding

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<sup>30</sup> M. Blauberger, R. Daniel Kelemen. "Can Courts Rescue National Democracy?" 326.

<sup>31</sup> R. Kelemen. "Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union." *Government and Opposition* (January 2017): 224.

regulations and directives from Brussels. Specifically, remaining compliance literature postulates the theoretical and practical reasons driving states not to comply; scholars take two major perspectives. First, as embodied by Olsen (1965), Axelrod (1984), and Yarbrough and Yarbrough (1991), the enforcement approach to compliance argues that breaches in treaty obligations are intentional, calculated by the Member State based on cost-benefit analyses. Based in game theory and political economy, the answer to ensuring compliance is to therefore increase the costs of non-compliance, through effective monitoring and threats of sanctions.<sup>32</sup>

Management theorists such as Young (1992), Keohane (1993), and Chayes and Chayes (1995) argue that non-compliance is the result of a lack of capacity rather than a lack of will, and can therefore be inadvertent.<sup>33</sup> Thomann and Zhelyazkova (2017) interestingly contextualize these theories by chronicling the ways in which E.U. law is applied in 27 various national legal contexts, finding great diversity in implementation degrees and practices. One commonality in compliance literature, however, is how seldom scholars analyze ways to measure compliance itself. Most researchers rely upon infringement cases brought from the European Commission (E.C.) against Member States allegedly violating E.U. law as the basis for their analysis, theorizing the ways to ensure compliance and debating the organizational risks associated with exerting too much pressure on national governments to comply. Not many alternative metrics for tracking compliance exist; this will be discussed in detail below.

Due to the recent nature of this thesis topic—populist extremist parties like Law and Justice in Poland and Fidesz in Hungary only came to majority power in 2015 and 2010, respectively—a final important point in research that is lacking is combining these disparate sets

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<sup>32</sup> Jonas Tallberg. “Paths to Compliance: Enforcement, Management, and the European Union,” 611.

<sup>33</sup> Ibid, 613.

of theory to enrich analysis about potential institutional legitimacy and trends in compliance. Not many scholars have applied theories of compliance with E.U. regulation *to* nations specifically in the control of far-right governments. Therefore, this study does so in an attempt to untangle whether domestic populist rhetoric equates to a reneging on international treaty obligations or simply represents a campaign strategy of “telling voters what they want to hear,” with backsliding effects seen domestically but little consequences seen internationally.

## **RESEARCH DESIGN AND OPERATIONALIZATION OF VARIABLES**

### **Data Set 1: Non-Compliance Trends and Parallel Demonstration of Theory**

*E.C. Infringement Cases as a Proxy for Compliance.* As discussed in the literature review, measuring compliance is not only a challenge for E.U. bureaucrats; it proves an elusive concept for scholars as well. However, in an attempt to track whether Member States are upholding or breaching their legal obligations over time, many researchers turn to new infringement cases brought forth by the E.C. against Member States. In accordance with Article 258 of the Treaty on the Functioning of the European Union, infringement proceedings may be initiated by the E.C. if a Member State is suspected of reneging on a legal obligation, or if a Member State is late in transposing European directives into national law. “Given its role as guardian of the Treaty, the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations,” according to an E.C.J. ruling from 2003; the E.C. thus has the authority to initiate a formal notice of infringement, a reasoned opinion, and as a last resort, a referral to the E.C.J. as it sees fit.

Infringement cases may also be brought forth by Member States against one another in the instance of suspected or detected non-compliance. However, only four cases since the

passage of the Treaty on the Functioning of the European Union have been brought by Member States: [1] in 1979 between France and the United Kingdom over fisheries, [2] in 2000 between Belgium and Spain regarding the bottling of wine and the free movement of goods, [3] in 2006 between Spain and the United Kingdom regarding voting rights in Gibraltar, and [4] in 2012 between Hungary and Slovakia due to Slovakia denying entry to László Sólyom, the incumbent Hungarian president. For the purposes of this analysis, therefore, infringement cases brought by Member States against one another are negligible, and E.C.-initiated proceedings are prioritized.

The basis for using infringement cases as a metric for compliance is summarized by a E.C. report from October 2010 which outlines strategies for the improved implementation of fundamental rights in the Union. De Schutter (2017) cites, “The Commission is determined to use all the means at its disposal to ensure that the Charter is adhered to by the Member States when they implement Union law. *Whenever necessary it will start infringement procedures against Member States for non-compliance with the Charter* in implementing Union law. Those infringement proceedings which raise issues of principle or which have particularly far-reaching negative impact for citizens will be given priority” [emphasis added by author].<sup>34</sup> The self-declared proclivity for the E.C. to bring forth infringement proceedings is promising. Observable legal trends by scholars tracking E.C. behavior provides more concrete rationale for the metric.

One notable strength in using infringement proceedings as indicators of compliance is the observed trend in European supranational governance from negotiating compliance with Member States toward *prosecuting* their non-compliance. This trend is introduced by Bonnie (2007), in which she states, “the European Commission itself is contributing to the compliance effort by making a much more systematic use of infringement procedures... [there exists] a substantial

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<sup>34</sup> Olivier De Schutter. "Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union." *Open Society European Policy Institute* (October 2017): 7.

reinforcement of the role of the Commission as the negotiator of the Member States' compliance."<sup>35</sup> Despite the fact that the number of E.C.-initiated infringement proceedings steadily decreases after 2008 (a trend which will be considered below), Bonnie's theory still helps to inform E.C. behavior. The Union's increasingly prosecutorial approach to non-compliance, in conclusion, strengthens the value of infringement cases as a measure.

Another question that may arise is the choice to focus on the number of infringement cases as opposed to Article 7 proceedings. Established by the 1997 Treaty of Amsterdam, Article 7 creates a sanctioning method against Member States that breach the fundamental democratic commitments delineated in Article 2 of T.E.U., exactly the type of commitments that right-wing populists threaten to breach. However, as outlined by Sedelmeier (2014), the bar for enacting Article 7 sanctions is extremely high. Sedelmeier explains, "the determination of such a breach is very demanding. It requires a proposal by either one-third of the Member States or the Commission, the consent of the European Parliament (by a two-thirds majority of votes cast if representing a majority of MEPs) and unanimous agreement in the European Council (not counting abstentions or the Member State accused)."<sup>36</sup> For these reasons, Article 7 sanctions are very seldom proposed, and the highest sanction permitted by the Treaty of Amsterdam—a suspension of a Member States' voting rights—has never been approved. Therefore, focusing on infringement cases, as opposed to Article 7 proceedings, ensures a larger set of data through which to analyze trends in Member State compliance over time.

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<sup>35</sup> A. Bonnie. "The Evolving Role of the European Commission in the Enforcement of Community Law: From Negotiating Compliance to Prosecuting Member States?" *Journal of Contemporary European Research* (2007): 39.

<sup>36</sup> U. Sedelmeier. "Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession." *Journal of Common Market Studies* (2014): 107.

One of the challenges with relying upon cases brought forth by the E.C. against Member States as a measure of a state's non-compliance, however, is the inherently political nature of the infringement proceeding exercise. As Blauberger and Kelemen (2017) warn, "The Commission enjoys great discretion as to whether to initiate or to settle infringement proceedings, and critics note that the Commission often postpones politically sensitive conflicts and launches cases only when it seems most likely they will prevail (Conant 2002: 75). This practice of selective enforcement may help explain why the Commission has not pursued more infringements against the Hungarian government in recent years."<sup>37</sup> Thus, to use infringement cases to operationalize non-compliance is to tacitly accept the subjective decisions of the E.C. as objective, and to subject one's analysis to the bias and confounding factors involved with political decision making. For example, confronted with the rise of far-right parties in seats of national power, the E.C. may prove hesitant to impose infringement proceedings, in an effort to quell any anti-E.U. sentiment that festers among the people—or at least in national legislatures. The nationality of Donald Tusk, the current European Council president, may also prove a confounding variable for this analysis, as the E.C. may be more prone to bring cases against Tusk's native Poland, which is currently ruled by his former political opponent.<sup>38</sup> Alternatively, the Commission may be habitually stricter with founding members than with the more recently acceded Member States formerly part of the Soviet bloc, may be more lenient with bringing forth infringement cases in national or European parliamentary election years, or may be more legally hawkish with Euroskeptic parties that, from the perspective of the E.U. bureaucrats, normatively threaten the institution. The confounding factors abound. However, as De Schutter (2017) argues, "In contrast to Article 7 TEU procedures or the delivery by the CJEU of preliminary rulings,

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<sup>37</sup> M. Blauberger, R. Daniel Kelemen. "Can Courts Rescue National Democracy?" 323.

<sup>38</sup> Sil, Personal communication, November 19th, 2018.



infringement proceedings depend neither on political support from the Member States, nor on the cooperation of domestic courts. Therefore... infringement proceedings remain an indispensable tool of which the potential is currently underestimated.”<sup>39</sup> The initiation of infringement proceedings, despite its methodological imperfections, thus remains a less politically-skewed choice than many other potential metrics.

Another issue with infringement cases as a operationalization tool is the fact that infringement proceedings can be initiated by the E.C. *before* an infringement upon E.U. law is made—a proactive attempt to prevent non-compliance before it occurs. In his argument for the more frequent use of the robust infringement apparatus as a means to ensure national compliance with the fundamental rights outlined in Article 2 of the Treaty of the European Union, De Schutter (2017) explains the potential for “ex ante” infringement cases. “Infringement proceedings,” he says, “are specific in that they can be filed even prior to the adoption of individual measures applying general rules or policies to specific situations; they can operate preventively, forcing a State to comply with the requirements of E.U. law before specific measures are adopted that might affect individuals.”<sup>40</sup> Thus, infringement proceedings make tracking non-compliance even murkier, as it can be unclear whether the E.C. initiates proceedings against a Member State due to *observed* non-compliance or *predicted* non-compliance, which, naturally, is unhelpful in an analysis to uncover the legal consequences of electing far-right populist parties in Member States.

As Putnam (1992) advises in his *Making Democracy Work*, “The prudent social scientist, like the wise investor, must rely on diversification to magnify the strengths, and to offset the

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<sup>39</sup> O. De Schutter. “Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights,” 5.

<sup>40</sup> Ibid, 5.

weaknesses, of any single instrument.”<sup>41</sup> Thus, given the potentially confounding variables involved with the use of infringement cases as a proxy for measuring compliance, a triangulation of indicators is warranted.

The triangulation of indicators in this section of the study, however, will not occur beyond the boundaries of the comparative legal framework already established. Blauberger and Kelemen (2017) claim, “The EU’s powerful system of law enforcement, encompassing both centralized enforcement by the Commission before the ECJ and decentralized enforcement by private parties before national courts, is arguably the institutional backbone of the union.”<sup>42</sup> Therefore, while other spheres of regulation—such as trade, labor, and environmental obligations, as well as fiscal requirements—could be explored (and compliance by Member State measured in the aforementioned areas), the number of infringement proceedings initiated provides both [1] a handy methodological “catch-all” for tracking violations in 40 E.C. policy areas from Fisheries and Maritime Affairs to Justice, Fundamental Rights, and Citizenship, as well as [2] a reflection of the strong legal character of the E.U. itself. Entire books can be, and have been, written about Member State compliance in the specific spheres of environmental regulation or fiscal requirements; however, in order to remain within the “case-based” comparative approach, the second proxy for non-compliance will be the number of preliminary reference cases referred *up* from local and national courts *to* supranational judicial bodies in Luxembourg.

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<sup>41</sup> Robert Putnam, R. Leonardi, and R. Y. Nanetti. *Making Democracy Work*. (Princeton University Press: Princeton, 1992), 12.

<sup>42</sup> M. Blauberger, R. Daniel Kelemen. "Can Courts Rescue National Democracy? Judicial Safeguards Against Democratic Backsliding in the EU." *Journal of European Public Policy* (2017): 332.

*Preliminary Reference Procedure as a Proxy for Compliance.* In addition to new infringement cases, another factor which will be explored as a proxy for compliance with E.U. legal obligations is the incidence of cases referred by national and local courts within Member States to the European Court of Justice (E.C.J.).<sup>43</sup> These cases are known in the literature as the preliminary reference procedure, preliminary ruling procedure, or simply, private litigation. Pavone (2016) explains the steps involved with the preliminary reference procedure, and its legal basis, stating:

The central institutional mechanism for private actors to claim and expand their EU legal rights and for judicialized governance in Europe is known as the ‘preliminary reference procedure.’ Established by Article 177 of the 1957 Treaty of Rome (and now governed by Article 267 of the Treaty on the Functioning of the EU), the procedure provides that any domestic court facing a question that implicates EU law may (and sometimes must) temporarily stay the proceedings and refer the case to the EU’s supreme court—the European Court of Justice (ECJ)—so that it can interpret EU law. The ECJ then provides an interpretation and often suggests whether domestic law contravenes European rules.<sup>44</sup>

One reason scholars use private litigation as a proxy for measuring compliance with E.U. regulations and E.C. directives is a consequence of the argument presented in Kelemen’s *Eurolegalism*. Kelemen (2011) contends that the European integration process has created [1] a regulation enforcement structure completely dependent upon courts, and [2] a legal culture in the E.U. resembling American-style adversarial-legalism—as explored and defined by Kagan (2001)—more than traditional European practices. Kelemen states:

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<sup>43</sup> Lynch, Personal Communication. 11/23/2019.

<sup>44</sup> T. Pavone. "Democracy by Lawsuit, Or, Can Litigation Alleviate the European Union's 'Democratic Deficit?'" *Constitutional Studies* (2016): 60.

The juris touch is a blessing in that it enables the E.U. to govern. The E.U. is a community built on the rule of law, and it is above all the strength of the E.U.'s legal system that distinguishes it from all less powerful supranational institutions... The E.U. could not hope to achieve much in the regulatory arena without the tools of adversarial legalism. If the E.U. is any kind of state, it is a weak one with an extremely limited administrative capacity. And like some other weak states, the E.U. relies on courts and private litigants to function as substitutes for a more robust administrative apparatus.<sup>45</sup>

In the absence of strong parliamentary enforcement mechanisms within the Union's institutional architecture, therefore, tracking compliance through the incidence of the preliminary reference procedure is a valuable methodological alternative.

Ascribing to a Dworkinian philosophy of law also makes one receptive to this approach. Dwork (1978)—as outlined by Pavone—claims that courts are the democratic fora best suited to ensure individual rights, as they are “better able to treat rights as ‘trumps’ over utilitarian policy considerations, which are the domains of the political branches of government.”<sup>46</sup> Combined with the transition of the European Union from an international organization based upon treaties amongst states to an almost federal “state” that ensures rights to individual citizens irrespective of their national identity within the Union—as explored by Kelemen (2006) and Weiler (2011)—it is unquestionable that the E.U. as an institution is reliant upon what Pavone coins “democracy by lawsuit.” Relying on court cases as a basis for measuring compliance is, therefore, a clear logical progression from the institutional character of the Union. Furthermore, Pavone states, “it is undeniable that the EU Parliament would be an exceptionally weak parliament if transplanted

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<sup>45</sup> R. Daniel Kelemen. *Eurolegalism: The Transformation of Law and Regulation in the European Union*. (Harvard University Press: London and Cambridge, 2011), 20.

<sup>46</sup> T. Pavone. “Democracy by Lawsuit,” 69.

in a domestic setting; Contrariwise, the ECJ would be exceptionally strong if transplanted to a domestic setting. The point is that legal integration in the EU has deepened and accelerated trends in judicialization and erosion of parliamentary sovereignty that, while a fairly general phenomenon, are more pronounced in the EU” than in other polities.<sup>47</sup>

One potential limitation involved with the use of private litigation as a metric is the fact that there are many barriers to successfully initiating a lawsuit against a Member State as a private litigant. Legal expertise, financial resources, and temporal availability are all prerequisites to initiating a court case, despite the ideals of “upholding individual rights” that citizenship in the E.U. may promise. Conant (2002) explains that “commercial enterprises, societal interest organizations and public enforcement agencies are most likely to gain access to courts to enforce EU legal norms because they are most likely to possess the knowledge and financing necessary for litigation,” while Borzel (2006) describes the “empowerment of the already powerful” within European society as a result of the preliminary reference procedure guaranteed by the 1957 Treaty of Rome.<sup>48</sup> Therefore, not all breaches of treaty obligations will be accounted for in preliminary rulings, *nor* do they provide a comprehensive overview of the variety of breaches, as the Member State non-compliance that most affects powerful “repeat players” is the most likely to be reflected in the data. However, some scholars find that private litigation with European law *is* making an impact in the sphere of social and civil rights and expanding access to the legal promises of the E.U. on a more egalitarian basis. Cichowski (2006) says, “at the supranational level, the ECJ has provided rights-claiming opportunities and expanded protection,” [and] “they may create more avenues for participation in democratic

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<sup>47</sup> Ibid, 71.

<sup>48</sup> T. Pavone. “Democracy by Lawsuit,” 72.

politics.”<sup>49</sup> Additionally—and more consequential for the methodology of this study—is the fact that the potentially undemocratic character of private litigation to ensure compliance with E.U. law is constant over time. Thus, the validity of the method is uncompromised, as the incidence of cases is simply tracked relative to the number of cases referred in years past, and the potential barriers to access to the legal procedure is unchanging in the timeframe of the study.

Another challenge with the use of preliminary reference proceedings as an indicator of Member State compliance is the fact that “many infringements of fundamental values such as democracy and the rule of law, e.g., regarding the separation of powers or the political independence of non-majoritarian institutions, do not constitute violations of individual rights that would establish a basis for private litigation.”<sup>50</sup> This is not to say that all areas of fundamental rights are ignored in the study; they are encompassed by the data provided in infringement cases initiated by the E.C., as opposed to preliminary ruling procedures initiated by private litigants. However, the exclusion of said cases requires one to postulate that, since undermining political institutions do not constitute a violation of rights commensurate with the option to pursue prosecution as a private litigant, then non-compliance may be slightly more extensive than the observed numbers of preliminary reference procedures would suggest.

*Delineating Methods: Parallel Demonstration of Theory.* Skocpol and Somers (1980), in their seminal work on methods of comparative history, outline three distinct comparative methodologies, one of which is the parallel demonstration of effects. In this approach, they argue, “the reason for juxtaposing case histories is to persuade the reader that a given, explicitly delineated hypothesis or theory can repeatedly demonstrate its fruitfulness—its ability

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<sup>49</sup> R. Cichowski. "Courts, Rights, and Democratic Participation." *Comparative Political Studies* (2006): 70.

<sup>50</sup> M. Blauberger, R. Daniel Kelemen. "Can Courts Rescue National Democracy?" 327.

convincingly to order the evidence—when applied to a series of relevant historical trajectories.”<sup>51</sup> This first pillar of data warrants an approach resembling the parallel demonstration of theory, since the trends witnessed across C.E.E. Member States experiencing far-right-populist-initiated backsliding mirror one another and help elucidate the pertinence of a theory to many cases.

## **Data Set 2: Case Study and Most Similar Systems Design**

*Case Selection.* Poland and Hungary are by no means the only two E.U. Member States experiencing a reversion to authoritarian tendencies. Romania, Slovenia, and even Austria feature prominently in the literature on backsliding and the ascent of norm-challenging populist parties to power in national governments. This section will therefore [1] explore the nature of backsliding in those states—namely Romania and Austria, studies of which are ubiquitous—and explain the political particularities which make them unideal case studies, [2] delineate the circumstances of E.U. accession, demographic trends, and governmental erosion of democratic institutions that make Poland and Hungary ripe for comparison, and [3] specify the comparative methodology that will be employed to analyze the case studies.

Both Sedelmeier (2014) and Iusmen (2015) explore the incidence of democratic backsliding in Romania, particularly in the context of the attempted impeachment of President Traian Băsescu in July 2012. Iusmen (2015) chronicles the constitutional crisis initiated by Prime Minister Victor Ponta and the newly elected Social Liberal Union (U.S.L.) coalition against the sitting president, Băsescu of the Democratic Liberal Party (P.D.L.).

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<sup>51</sup> M. Somers and T. Skocpol. “The Uses of Comparative History in Macrosocial Inquiry.” *Comparative Studies in Society and History* (April 1980): 176.

... Between 3 and 6 July 2012, a set of ‘*blitzkrieg*’ measures, violating key constitutional provisions and democratic procedures, were hastily implemented to pave the way for the President’s suspension. For instance, in blatant disregard of the Constitution and democratic procedures, and via the use of emergency ordinances, the USL government dismissed the ombudsman (which is the only institution that can challenge the government’s emergency ordinances before the Constitutional Court), stripped the Constitutional Court of its right to check the constitutionality of parliamentary decisions and modified the referendum law by ditching the ‘participation quorum’ required for the validity of referenda and therefore lowering the turnout threshold to a majority of votes cast (that is, an ‘approval quorum’). Once these changes were in place, President Băsescu was hastily suspended by the parliament, accused of ‘serious’ breaches of the Constitution, and Crin Antonescu, the leader of PNL and Ponta’s main political ally, became acting President.<sup>52</sup>

The 2005 Venice Commission outlined that quorum in all referenda (the threshold of turnout determining the validity of a vote) within E.U. Member states may be defined as either quorum of participation or quorum of approval. In Romania, prior to the 2012 crisis, the first definition required half of all registered voters plus one to *participate* in a vote for the constitutional referendum to be considered valid. The second definition, which Ponta left unchanged, required Romanian constitutional referenda to be approved by a majority of the votes cast.<sup>53</sup> The change attempted by the prime minister would have allowed the outcome of the referendum to stand despite President Băsescu urging his supporters to boycott the vote altogether (in the hope that

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<sup>52</sup> Ingi Iusmen. "EU Leverage and Democratic Backsliding in Central and Eastern Europe: The Case of Romania." *JCMS: Journal of Common Market Studies* (2014): 595.

<sup>53</sup> *Ibid*, 595.



quorum of participation was not met). In short, Romania's case reflects attempts by a populist ruling coalition to undermine an E.U. Member State's rule of law in order to consolidate power, perfectly in line with the trends of domestic democratic backsliding witnessed in other C.E.E. Member States.

However, there are four major reasons Romania would not prove an ideal case study for the purposes of determining the legal-institutional consequences for the E.U. in light of democratic backsliding in C.E.E. Member States. First, Romania joined the European Union in 2007, three years after the first major expansion of E.U. membership to post-communist states. Therefore, relative to the other C.E.E. Member States currently experiencing some brand of democratic backsliding, such as Poland and Hungary, Romania (along with Bulgaria) represents a temporal incongruity that would make fruitful comparison more strenuous. Second—and a product of Romania's later accession—the nation was still subject to the E.U.'s Cooperation and Verification Mechanism at the time of the E.U. intervention to protect the rule of law when it came under attack from the Romanian prime minister. This E.U. oversight tool, central to the successful intervention in 2012, is not available vis-à-vis other Member States, and thus it would prove a confounding variable if Romania were to be chosen as a case study. Kelemen (2017) similarly emphasizes the unique nature of the supranational institutional response to backsliding in Romania, claiming, "To be sure, the success of the EU's intervention to protect the constitutional order in Romania was facilitated by the fact that Romania was still subject to a powerful oversight tool (the Cooperation and Verification Mechanism) that had been put in place in the context of its E.U. accession—a mechanism not available for states such as Hungary and

Poland.”<sup>54</sup> Third, both Iusmen (2015) and Sedelmeier (2014) emphasize the importance of issue linkage and material leverage in getting Romania to reverse course on the constitutionally dubious attempt to usurp President Băsescu by referendum, most notably the withholding of Romania’s Schengen Area membership contingent upon Romania’s compliance with the values enshrined in Article 2 of T.E.U. This is another particularity to Romania, as Slovenia, Poland, Hungary, and Austria all became Schengen Area members in 2003. Finally, while the majority of C.E.E. Member States currently demonstrating a backsliding from liberal democracy are headed by far-*right* populist parties or coalitions, the Romania case differs in the fact that a *left-wing* populist coalition led by the U.S.L. spearheaded the constitutional crisis. For the reasons outlined above, Romania has too many confounding political idiosyncrasies to serve as an effective case study in this investigation.

Austria’s Haider Affair is another interesting case of slippage toward authoritarianism in a post-accession Central European E.U. Member State, with an equally interesting response from international actors. The incident began after Austria’s 1999 parliamentary elections, in which the far-right Freedom Party (FPÖ) received almost the same vote share as the People’s Party (ÖVP), a center-right party that had received just over 26% of votes. The potential for a coalition government including FPÖ was unacceptable for many countries both within the Union and even beyond the European continent., since the FPÖ was ruled by Joerg Haider, a populist who often harkened back to Austria’s Nazi history with controversial statements such as, “The Waffen SS was a part of the *Wehrmacht*, and hence it deserves all the honour and respect of the army in public life.”<sup>55</sup> On January 31<sup>st</sup>, 2000, fourteen European countries therefore decided to impose

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<sup>54</sup> R. Kelemen. "Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union." *Government and Opposition* (January 2017): 219.

<sup>55</sup> "Joerg Haider: Key Quotes." *BBC News*, February 2, 2000.

diplomatic sanctions on Austria if a government was to be formed including Haider's party; five days later, it was. The sanctions thus entered into effect.

However, Austria has shortcomings for the purposes of comparative legal research. The first two reasons are, similarly to Romania, temporal irregularities that would risk coloring comparison. First, Austria's accession to the E.U. occurred with the enlargement of 1995, making it a much-longer-entrenched member of the institution than many of the other C.E.E. states whose national governments are flouting the rule of law. Second, the incidence at hand—the inclusion of the FPÖ in a coalition government after the Austrian legislative elections of 1999—occurred in 2000, years before states like Poland, Hungary, and Romania started exhibiting post-accession backsliding, and even more significantly, years before the 2008 global financial crisis, which greatly altered the operations of the E.C. Third, and perhaps most importantly, the intervention by Member States in an attempt to combat FPÖ's worldview in Austria was *not* technically an E.U. project. Sedelmeier (2014) explains, "It is important to note that the sanctions used in this case were not EU measures – let alone based on Article 7. Instead, the other Member States adopted bilateral, albeit co-ordinated, diplomatic sanctions against the Austrian government."<sup>56</sup>

Poland and Hungary, it must be said, serve not only as case study "defaults" due to the confounding variables present in other cases of backsliding in C.E.E. Member States. The striking similarity in Hungary and Poland's post-communist histories of right-wing populism and their methods of undermining democratic institutions domestically once elected, paired with a divergence in outcomes regarding the response from the E.U. compliance legal apparatus, make them ripe for an analysis using Mill's Method of Difference.

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<sup>56</sup> U. Sedelmeier. "Anchoring Democracy from Above?" 105.

*Delineating Methods: Most Similar Systems.* According to Skocpol and Somers (1980), Mill's Method of Difference—commonly referred to in the comparative politics literature as the most similar systems design—allows researchers to “contrast cases in which the phenomenon to be explained and the hypothesized causes are present to other (‘negative’) cases in which the phenomenon and the causes are both absent, although they are as similar as possible to the ‘positive’ cases in other respects.”<sup>57</sup> The benefits of such a method are numerous. Analyzing comparative history in such a manner, promise Skocpol and Somers (1980), “has the considerable virtue of being the only way to attempt to validate and invalidate causal hypotheses about macro-phenomena of which there are intrinsically only limited numbers of cases.”<sup>58</sup> The incidence of right-wing populism in C.E.E. Member States of the E.U. is undoubtedly a phenomenon with limited cases, making any attempt at statistical analysis impossible. The Method of Difference, therefore, allows the study to delineate the numerous similarities between the Poland and Hungary cases and explore the potential causes of the divergent supranational legal intervention. As will be delineated in the section entitled “Poland and Hungary: Homogenous History and Parallel Populisms,” the independent variable affecting divergent E.U. decision-making may be the “on-paper” constitutionality of populist reforms.

Nevertheless, the most similar systems design—as all social science experimental designs—does have limitations. First, the universal generalizability of the theory beyond the case studies being investigated can never be assumed. Second, perfectly controlled comparisons, which eliminate all confounding factors irrespective of the independent and dependent variables, are also unfeasible. History seldom, if ever, provides such cases, as political, economic, social, historical, cultural, and demographic realities cannot be completely controlled for in the real

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<sup>57</sup> M. Somers and T. Skocpol. “The Uses of Comparative History in Macrosocial Inquiry,” 183.

<sup>58</sup> Ibid, 193.

world. A triangulation of methodology and data sets between the parallel demonstration of theory and the most similar systems design hopes to mitigate some of the limitations involved with employing only one comparative method. The following section begins the investigation into the data: the incidence of supranational court cases over time in C.E.E., and the trends it can help to elucidate about Member State compliance.

### **TRACKING TRENDS IN NON-COMPLIANCE**

As stated in the previous section, the first pool of data to be explored is the trend, over time, in the number of cases brought by the European Commission against Member States on the basis of observed or suspected non-compliance with E.U. law, as well as those cases initiated by private litigants and subsequently referred by local and national courts up to the European Court of Justice. The study refers to these proceedings as “top-down” cases and “bottom-up” cases, respectively, in reference to the direction of case flow (either from the supranational to the national level or vice versa). The rationale for using said cases as indicators of Member State non-compliance has already been discussed; however, hypotheses of expected trends in light of far-right populist electoral success in C.E.E. have not.

Most right-wing populist leaders such as Orbán and Morawiecki are not shy, on their respective national stages, about their disdain for the E.U. as an institution. With open attacks on minorities, attempts to undermine the separation of powers—most notably, judicial independence—in order to consolidate their party’s grip on state power, and a rejection of the liberal, pluralistic order enshrined in Article 2 of the T.E.U., it is not unreasonable to predict an increase in the incidence of non-compliance following the election of governments in which a parliamentary majority belongs to a far-right populist party. It can be deduced, therefore, that

Member States' decreased proclivity to comply with E.U. law would imply an *increase* in the number of infringement cases brought against them by the Commission. The opposite holds true.

### **Top-Down Data: Infringement Cases Initiated by the European Commission**

Figure 3 maps the number of new infringement cases brought by the E.C. against each Member State over time, specifically from 2004—the year of E.U. accession for many of the former Soviet bloc countries in C.E.E.—to 2017, the most recent data published by the European Commission. There exists a notable decrease in the number of new infringement cases brought by the E.C. across the board since 2004, with the total number of new infringements standing at 2993 cases in 2004 and decreasing dramatically to only 716 new cases initiated in 2017. This is particularly interesting, because, given the accession of twelve new Member States between 2004 and 2007—and the increased non-compliance potential they represent by the sheer nature of the Union's expanded membership—one would expect an increase in the incidence of infringement cases. Figure 4 limits the countries in question to only those twelve (mostly) post-communist C.E.E. states that joined the E.U. in 2004. The downward trend holds. The data becomes even more interesting when limiting the visualization to the two case studies employed in the most similar systems investigation later in the study: Poland and Hungary.

Figure 3

## Tracking Non-Compliance: New Infringement Cases Per Year

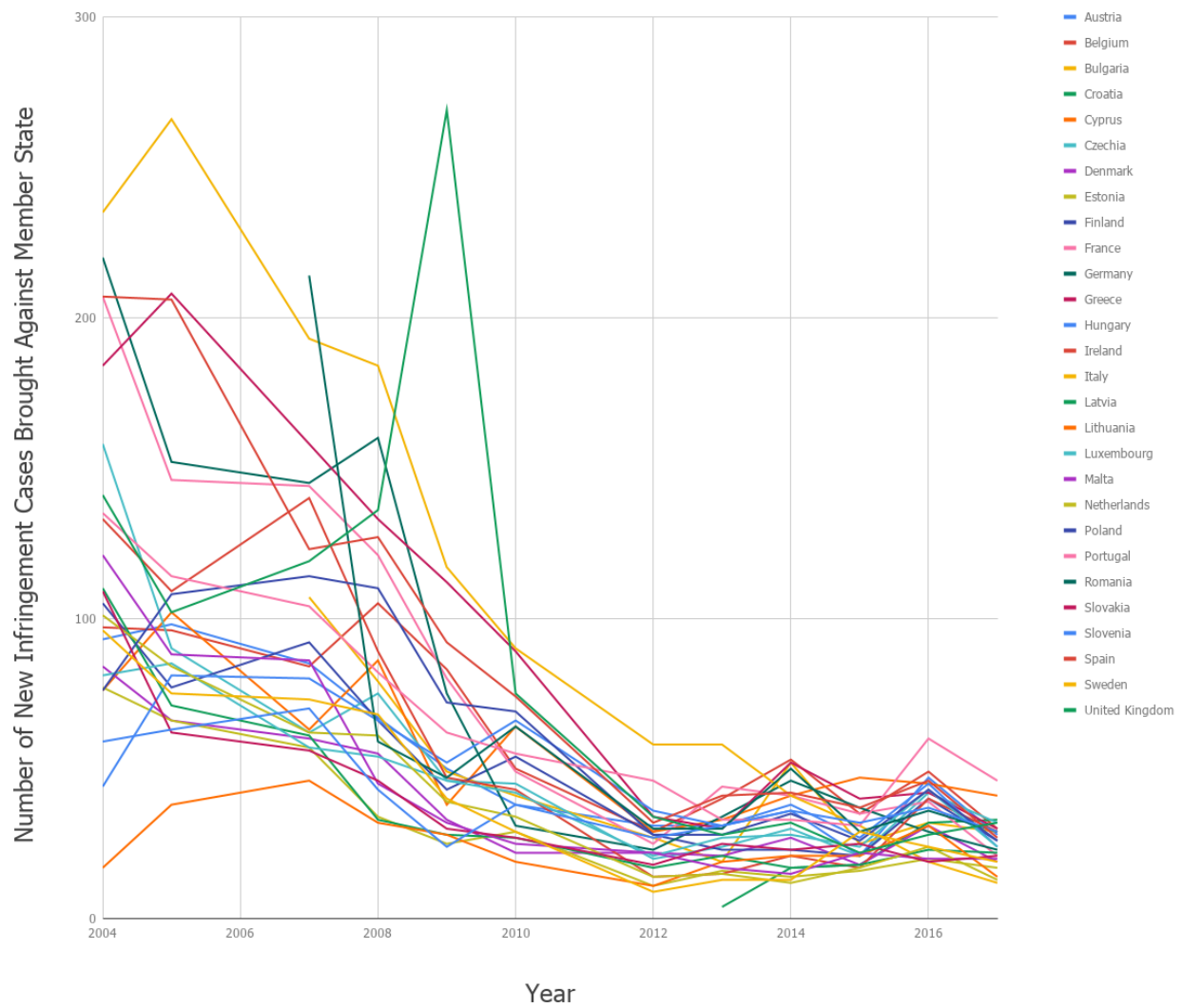
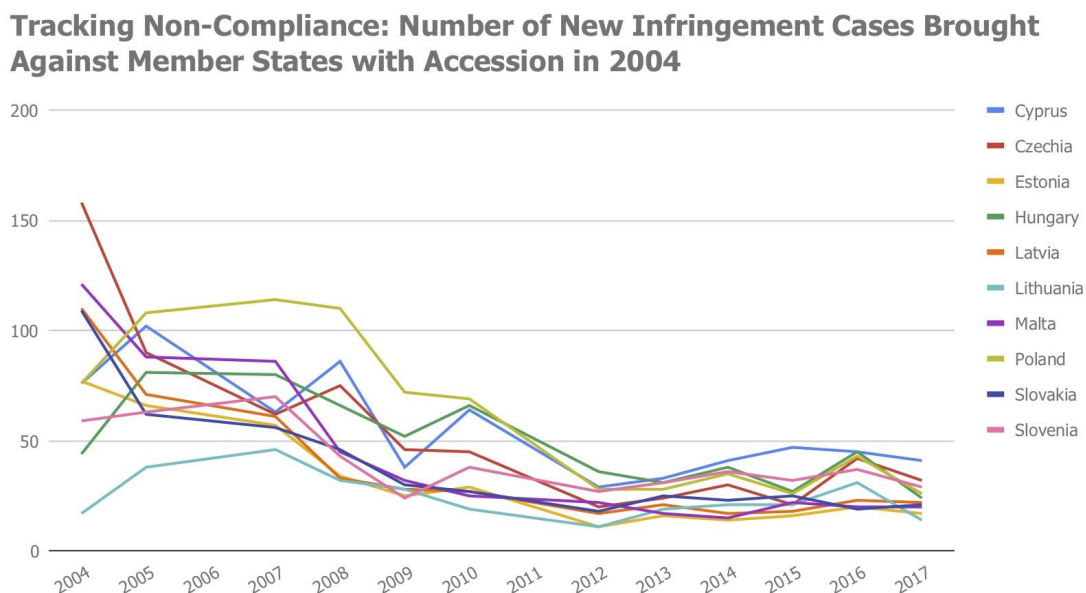


Figure 4



As evidenced by Figures 5 and 6, the downward trend from 2004-2017 holds in the countries that will serve as specific case studies—Poland and Hungary. Considering the presumed increase in infringement cases that would be witnessed against states led by right-wing populist parties who flout E.U. rhetorical norms and attempt to undermine democratic institutions in their home countries, the data thus present a puzzle. Euroscepticism and illiberalism, after all, run through the hearts of both PiS and Fidesz. At a speech in July of 2018, Orbán touted that “Christian democracy is not liberal... Christian democracy gives priority to Christian culture... Christian democracy is anti-immigration... [and] Christian democracy rests on the foundations of the Christian family model.”<sup>59</sup> He habitually voices concerns about the “biological decline” of Hungary and Europe as a whole—an overtly and notably racist contention—and claims that “[Hungarians] would be able to deal with Islam if we were allowed to deal with it in the way we think we should.” Similarly, Kaczyński in Poland has expressed

<sup>59</sup> Ercolessi, Giulio. "The Sargentini Report: A Christian Dilemma." *Euractiv*, September 11, 2018.



pointedly anti-E.U. sentiment, warning that Poland mustn't "repeat the mistakes of the West and become infected with social diseases that dominate there."<sup>60</sup> Based upon the anti-E.U. rhetoric espoused by the leaders in the two aforementioned countries, and the nationalist tone they strike, one may assume that they would be willing to breach international legal obligations as determined by their E.U. membership, in which case an increase in infringement proceedings initiated by the E.C. would be seen from 2010 and 2015 onward (in Hungary and Poland, respectively). The opposite is clearly the case in Hungary, with the number of new infringement cases decreasing from 66 to 24 from the time of Fidez's formation of a government in 2010 to 2017, the most current data. In Poland, while the general decreasing trend holds (and remarkably mirrors the number of cases brought against Hungary each year), the shift since the formation of a PiS-led government in 2015 is largely indiscernible. Nevertheless, the recency of PiS' ascent to power provides researchers with only three annual data points regarding infringement cases, and more importantly, there is clearly no drastic *increase* in the number of proceedings being initiated by the E.C., as initially hypothesized. Thus, either [1] the European Commission has demonstrated a decreased willingness to bring infringement cases against Member States across the board, [2] the Commission is more discriminate in doing so (i.e. the E.C. "raised the threshold" for infringements that warrant prosecution), or [3] Member States are simply violating E.U. law less than they used to. The possibilities abound.

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<sup>60</sup> P. Sobczak and P. Florkiewicz. "Defiant Kaczynski Says Poland Must Avoid EU's 'social Diseases'." *Reuters*, September 2, 2018.

Figure 5

**New Infringement Cases Brought Against Hungary**

Red Arrow Denotes Fidesz in Majority Government

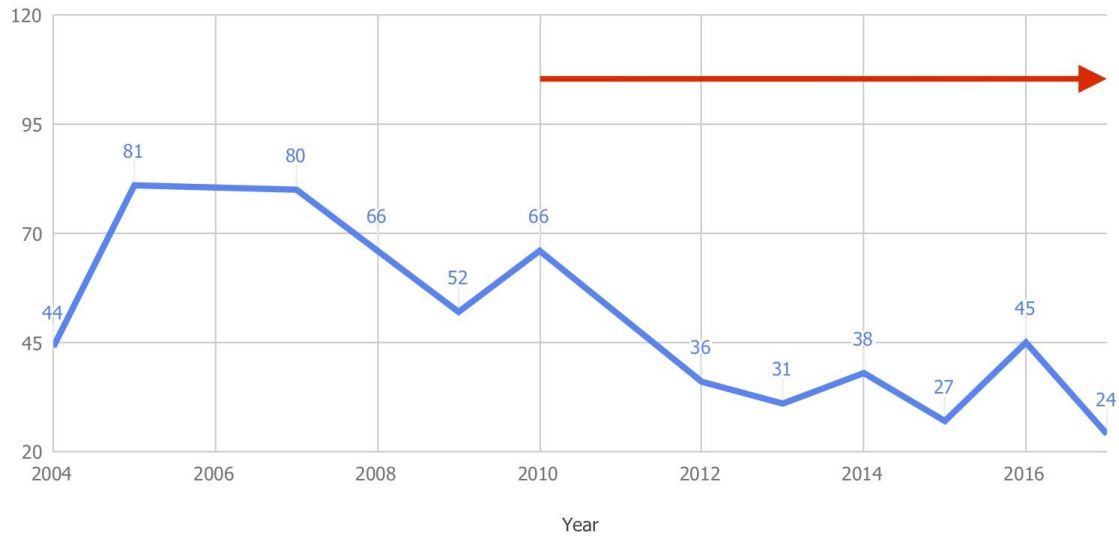
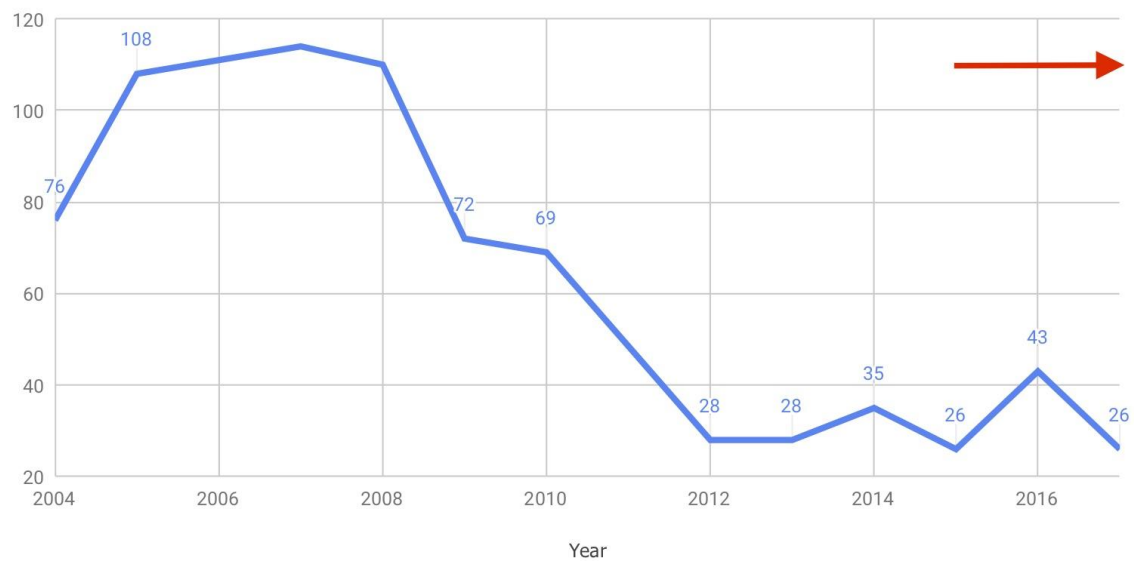


Figure 6

**New Infringement Cases Brought Against Poland**

Red Arrow Denotes Law and Justice in Majority Government



### **Bottom-Up Data: Preliminary Rulings Initiated by Private Litigants**

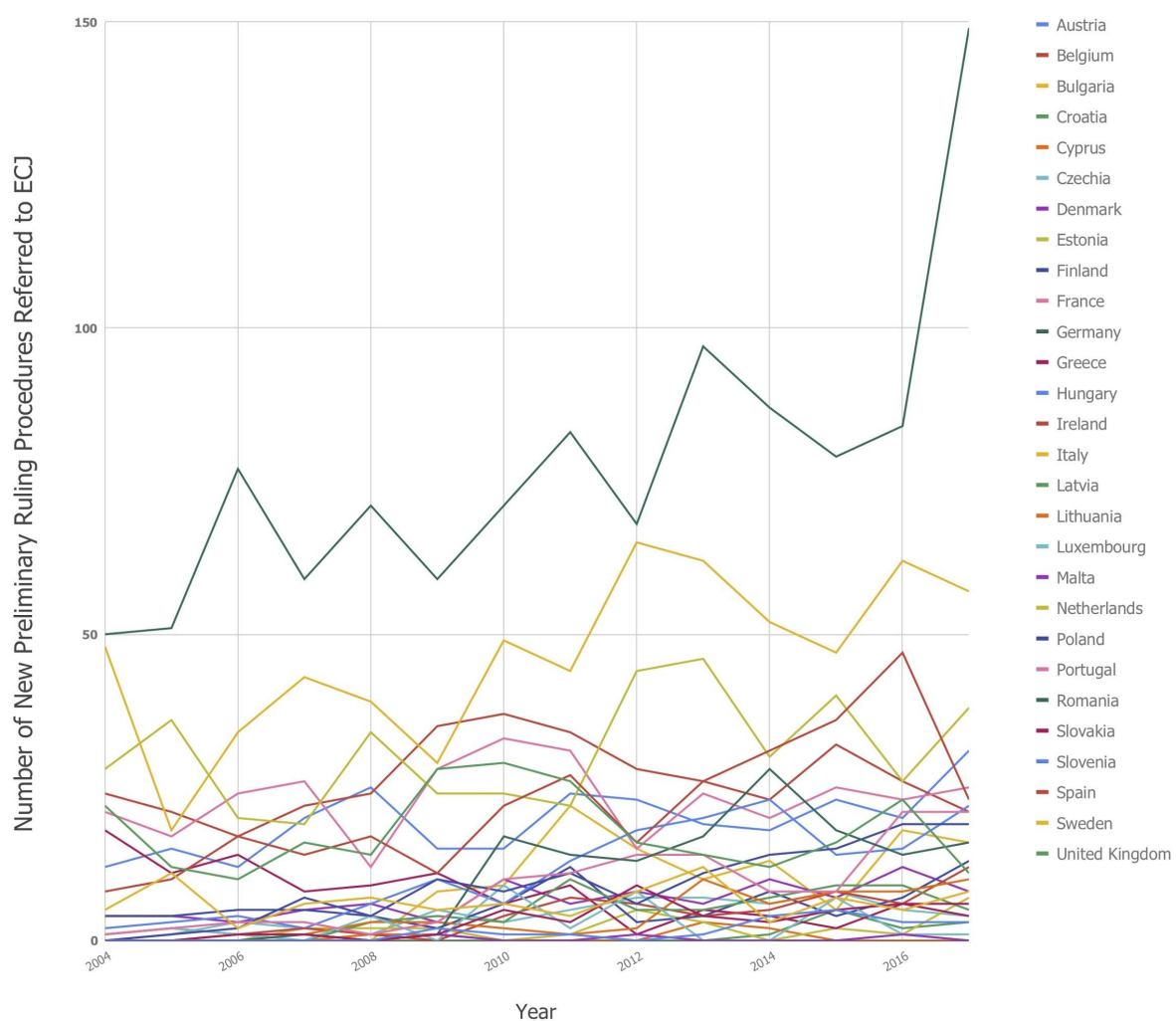
Due to the inherently political nature of the infringement procedure and the impossibility of drawing conclusions from *only* the downward flow of prosecution from the E.C. against Member States, an investigation into another proxy is warranted. This subsection will outline trends witnessed in the number of preliminary rulings referred to the E.C.J. from local and national courts within Member States. The following subsection will employ Skocpol and Somers' (1980) parallel demonstration of theory method to help explain trends in both the infringement cases outlined above and trends in private litigation presented below.

Figure 7 demonstrates an indiscernible temporal pattern across the 28 Member States of the E.U.; there is not a clear increase or decrease of individual citizens, organizations, or corporations alleging violations of their rights as European citizens in courts at the local and national level, and those cases being subsequently passed onto the E.C.J. in Luxembourg. A clearer trend emerges, however, when separating out states that acceded to the Union in 2004 (illustrated by Figure 8). Poland and Hungary, represented by the yellow-green and emerald-green lines, respectively, stand out as the two clear outliers. In both aforementioned Member States, the number of E.U. legal claims referred from regional and national courts in 2017 is far higher than the number referred at the time of accession in 2004. The trend, which is exemplified by Figures 9 and 10, is also noted by Blauberger and Kelemen (2017). They state, "As a whole, references have continuously risen since accession in 2004. Hungary stands out with the greatest number of references, largely owing to a steep increase after 2010, when Fidesz came to power and initiated a series of measures that critics argue have eroded liberal democracy... These

numbers lend support to the argument that private litigation may compensate for the Commission's limited enforcement capacities.”<sup>61</sup>

Figure 7

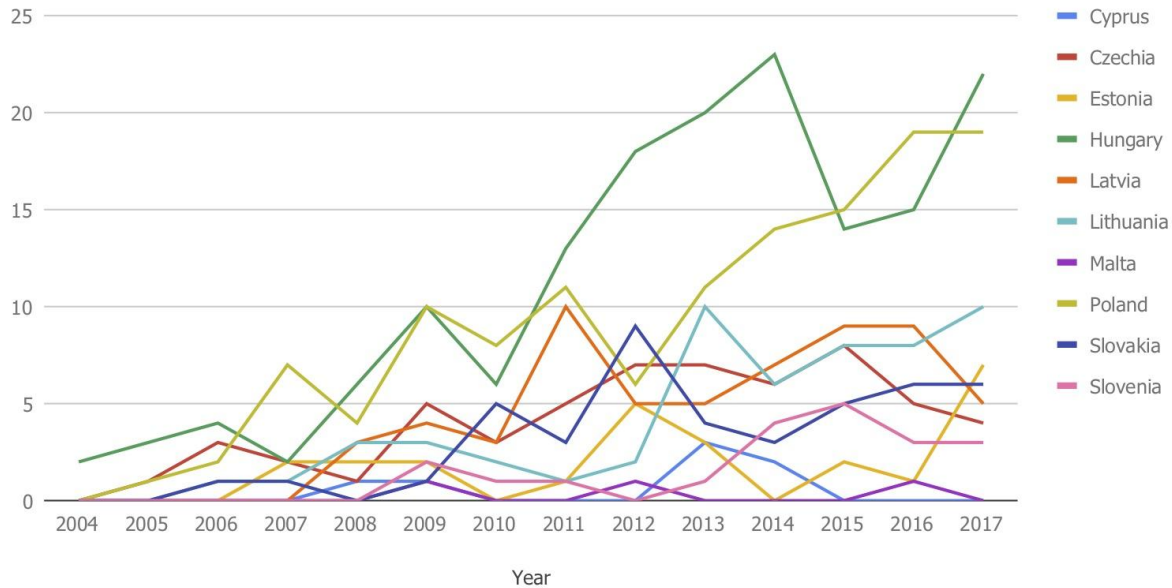
### Tracking Non-Compliance: New Preliminary Ruling Procedures Brought to ECJ by Member State



<sup>61</sup> M. Blauberger, R. Daniel Kelemen. "Can Courts Rescue National Democracy?" 327.

Figure 8

### Tracking Non-Compliance: New Preliminary Ruling Procedures Brought to ECJ by Member States with Accession in 2004



The increase in the number of cases referred by national and local courts in Poland and Hungary up to the E.C.J. for preliminary rulings accurately reflects scholarly expectations for right-wing populists. In the year of Fidez's election, Hungary referred a mere six cases to the E.C.J.; in 2017, they referred 22. In Poland, while the trend is more recent and less pronounced, the number of cases increased from 15 (when PiS came into power in 2015) to 19 in 2017. As hypothesized above, it is reasonable to expect an increase in non-compliance with E.U. law when parties like Fidesz and PiS become national leaders, given their active disapproval of the European project, favor for national sovereignty, and promise to revert from pluralistic, democratic conceptions of the nation to an ethno-nationalist one. As they rhetorically threaten the civil liberties of their citizens (especially those not deemed fully-fledged members of the imagined national community due to their race, ethnicity, religion, or sexual orientation), and

they increasingly encroach upon their rights, it would be expected that more would initiate legal proceedings in court to reassert those rights. That expectation is reflected in the data.

Figure 9

### New Preliminary Ruling Procedures Referred to ECJ by Hungarian Courts

Red Arrow Denotes Fidesz in Majority Government

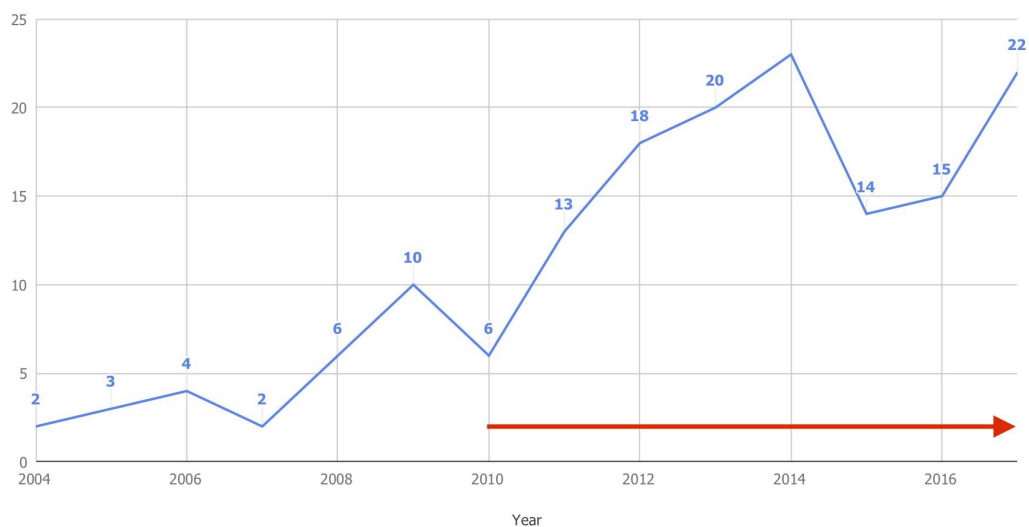
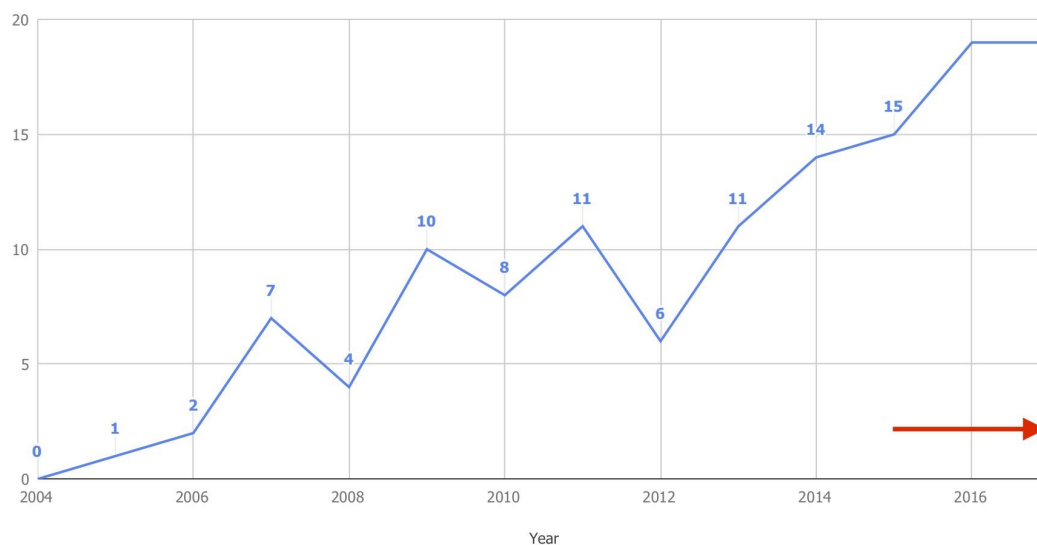


Figure 10

### New Preliminary Ruling Procedures Referred to ECJ by Polish Courts

Red Arrow Denotes Law and Justice in Majority Government



### **Explaining the Unexpected: Parallel Demonstration of Theory**

The decrease in the incidence of infringement cases brought against Hungary since the rise to power of Fidesz in 2010, and the greatly indiscernible trend witnessed in Poland since the PiS parliamentary victory in 2015 (but certainly not a clear *increase* in the incidence of infringement proceedings) may imply that the far-right populism cautioned by so many scholars and E.U. bureaucrats is merely a rhetorical strategy with domestic policy implications, but little to no effect on compliance with E.U. legal obligation once elected. In order to explain the decrease in infringement proceedings initiated against both Poland and Hungary, three theories are proposed.

The first theory of why the E.C. has prosecuted so many less infringements year to year is that the 2008 global financial crisis and subsequent 2010 European sovereign debt crisis diverted so many institutional resources to financial damage control and economic stimulus that ensuring compliance was of secondary concern. Blauberger and Kelemen (2017) argue convincingly that, “Strikingly, the number of infringement cases referred to the ECJ decreased by over 72 per cent since the outbreak of the financial crisis in 2008. This decline is likely owing to both the fact that the Commission’s limited resources were being concentrated on addressing the eurozone crisis and the fact that the Commission was wary of offending Member State governments whose cooperation they needed to address the crisis.”<sup>62</sup> If the theory holds true, then the decreased number of infringement proceedings neither reflects an increase in compliance among Member States nor suggests that right-wing populist governments are more compliant than their mainstream predecessors. Rather, it reflects the financial constraints and limited capacity of an institution. This proposal helps to explain why the number of E.C.-initiated infringement

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<sup>62</sup> M. Blauberger, R. Daniel Kelemen. “Can Courts Rescue National Democracy?” 323-4.

proceedings decreased in *all* Member States (not just those with right-wing populist governments or those with accession in 2004) and converged in the range of 12 to 46 cases—remarkable when considering that the number of infringement proceedings brought against Member States ranged from 17 to 235 in the year 2004.

Another set of hypotheses revolves around the E.C.'s selective enforcement of infringements. One proposition specifies that the ruling parties at the time of infringement has an effect on the willingness of the E.C. to initiate infringement proceedings, with the E.C. specifically hesitant to sanction right-wing parties. This would not only explain the decreases in infringements brought against Poland and Hungary, but also the decreases brought against Italy, Finland, and Slovakia. It would also help elucidate the Commission's quickness to respond to Romania's 2012 backsliding initiated by the *left*-wing populist U.S.L. coalition, and speed with which E.C. President José Manuel Barroso issued what was came to be known as "Barroso's Eleven Commandments"—a series of demands targeted at Prime Minister Ponta and the parliamentary majority to ensure that the rule of law was upheld in Romania. Conant (2002) also argues that the Commission selectively enforces breaches, but differs in his contention that the crux of the E.C.'s willingness to charge Member States revolves around the probability that the Commission will *win* the case in front of the E.C.J., not the nature of the party at the helm of the Member State's government. "The Commission often postpones politically sensitive conflicts and launches cases only when it seems most likely to prevail," which may help to explain the drastic decrease in infringement proceedings initiated by the E.C. since 2004.<sup>63</sup>

A final hypothesis regarding the decrease in infringement proceedings focuses on the quality of each case, or the cases overall, rather than their quantitative sum. Given the puzzling

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<sup>63</sup> M. Blauberger, R. Daniel Kelemen. "Can Courts Rescue National Democracy?" 323.



decrease in the number of infringement proceedings initiated by the E.C., and given populist leaders' willingness to erode democratic institutions domestically, it is possible that the cases being brought against Member States are less in quantity but each more consequential in quality. Therefore, an investigation into the specific *nature* of the infringement cases brought against Member States controlled by far-right parties is prudent, and may suggest that the threat in C.E.E. remains a concretely legal one.

Following the logic of the management theorists referenced in the literature review, namely Young (1992), Keohane (1993), and Chayes and Chayes (1995), it can be argued that non-compliance with treaty obligations in policy areas such as the environment and financial stability are due to a lack of capacity rather than an active decision by policy-makers to defy legal commitments. It is much more difficult, however, to extend the same argument to a government's respect for negative rights as defined by Isaiah Berlin (1958), since the provision of justice and insurance of fundamental rights deal more with government *inaction* than government capability.<sup>64</sup> An analysis of the incidence of infringement cases specifically brought on the grounds of a suspected or observed violation in the policy area of "Justice, Fundamental Rights, and Citizenship," one of the 40 policy areas of the E.C., was thus conducted.<sup>65</sup> From

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<sup>64</sup> I. Berlin. "Two Concepts of Liberty." Lecture, United Kingdom, Oxford, October 31, 1958.

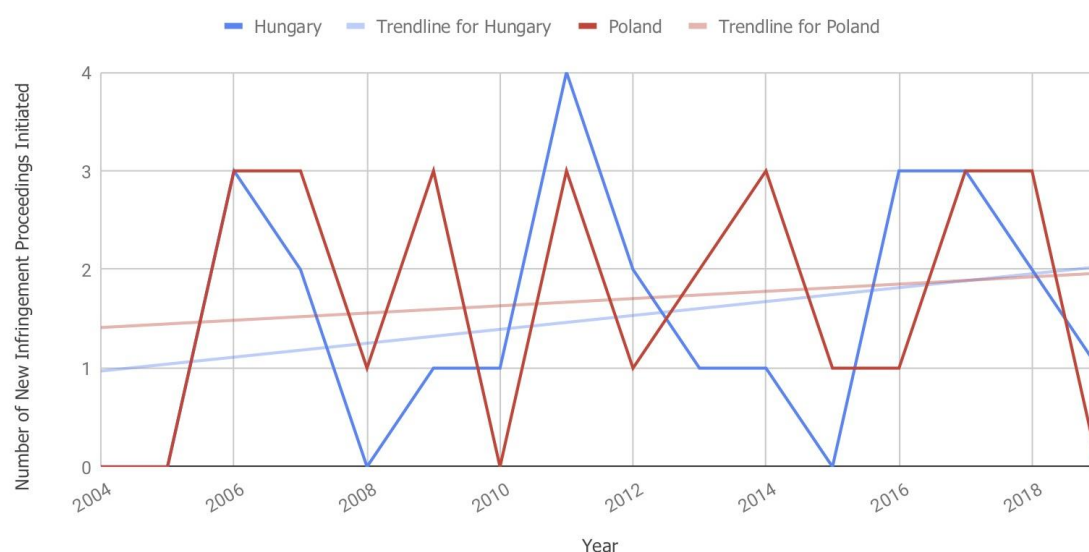
<sup>65</sup> The other policy areas are as follows: Agriculture and Rural Development; Budget; Climate Action, Communication Networks, Content and Technology; Competition; Development; Development and Cooperation- EuropeAid; Economic and Financial Affairs; Education and Culture; Employment, Social Affairs, and Equal Opportunities; Energy and Transport; Enlargement; Enterprise and Industry; Environment; European Anti-Fraud Office; Eurostat; External Relations; Financial Stability, Financial Services, and Capital Markets Union; Fisheries and Maritime Affairs; Health and Consumers; Health and Food Safety; Home Affairs; Human Resources and Security; Information Society and Media; Internal Market and Services; Internal Market, Industry, Entrepreneurship and SMEs; Justice, Freedom, and Security; Legal Service; Mobility and Transport; Neighborhood and Enlargement Negotiations; Personnel and

January 2004 until November 2015, before the newly elected PiS parliament began in Poland, there were 19 new infringement cases initiated on the basis of “Justice, Fundamental Rights, and Citizenship” being violated by the Polish government. Since PiS has been in power, there have been nine. In Hungary, from January 2004 until April 2010, before Fidesz was elected to parliament with a supermajority, there were six new infringement cases brought on the basis of “Justice, Fundamental Rights, and Citizenship” being violated by the Hungarian government. From May 2010 until today, there have been 17. The change over time is illustrated in Figure 11.

Figure 11

### New Infringement Proceedings

Brought Against States on the Basis of "Justice, Fundamental Rights and Citizenship" Breaches



An extremely slight increase in the annual number of “Justice, Fundamental Rights and Citizenship” infringement initiations is observed in both Hungary and Poland; however, even one infringement case per year—when said case accuses a Member State with undermining a

Supreme Court,<sup>66</sup> forcing the retirement of judges in order to pack the courts with judges harboring partisan loyalties to the party in power,<sup>67</sup> and illegalizing the activity of NGOs funded from outside one's country<sup>68</sup>—all constitute serious breaches each warranting closer investigation. The following study, which presents case studies of Poland and Hungary, hopes to do exactly that. A most similar systems assessment of the two aforementioned states will provide a deeper comparative view—and help assess the legal-institutional consequences for the E.U. in light of right-wing populist expansion in C.E.E.

## **HUNGARY AND POLAND: HOMOGENOUS HISTORY & PARALLEL POPULISMS**

### **Hungary**

*Fidesz in Power: Overview of the Domestic Crisis.* Hungary has a long history of illiberalism that does not begin with the formation of Fidesz in 1988. Hyper-nationalism, for example—especially in opposition to Romanians due to historical conflict over the region of

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<sup>66</sup> Infringement Number 20172121, which the E.C. referred to the E.C.J. on 9/24/2018, charges Poland with violating E.U. law regarding the independence of the judiciary. “The European Commission maintains that the Polish law on the Supreme Court is incompatible with EU law as it undermines the principle of judicial independence, including the irremovability of judges, and thereby Poland fails to fulfil its obligations under Article 19(1) of the Treaty on European Union read in connection with Article 47 of the Charter of Fundamental Rights of the European Union.”

<sup>67</sup> Infringement Number 20122012, which charged Hungary with violating E.U. law on age discrimination in the workplace, was decided by the E.C.J. in favor of the E.C. on 11/13/2013. “Following calls by the Commission for Hungary to comply with the judgement as soon as possible, the country took the necessary measures and adopted changes to its law.”

<sup>68</sup> Infringement Number 20172110, which the E.C. referred to the E.C.J. on 12/7/2018, charges Hungary with E.U. law related to the free flow of capital and the freedom of association. “Due to provisions in the NGO Law which indirectly discriminate and disproportionately restrict donations from abroad to civil society organisations... the Commission is also of the opinion that Hungary violates the right to freedom of association and the rights to protection of private life and personal data enshrined in the Charter of Fundamental Rights of the European Union.”

Transylvania—is a consistent feature in the Hungarian conceptions of self over time. Örkény (2006) delineates, “Economic nationalism is manifested in the protection of Hungarian goods; political nationalism emphasizes the political supremacy of national interests; and cultural nationalism draws a sharp line between perceived Hungarian and alien cultures, giving unilateral political preference to the former. Recent results reveal that nationalism is still a significant psychological and political force in Hungarian society.”<sup>69</sup> Örkény’s findings remain pertinent.

To properly historicize the existence of far-right populism, or any political trend in Hungary, however, it is imperative to assess the legacy of the communist era. Although Marxist-Leninist theory is, at its core, an internationalist theory, the legacies of Hungarian communism established a strong foundation for the perennial re-emergence of hyper-nationalist movements. Brubaker (1995) explains the contradictorily deepening of nationalistic tendencies within Soviet states and states in the Eastern bloc. “Far from ruthlessly suppressing nationhood,” he states, “the Soviet regime pervasively institutionalized it. The regime repressed *nationalism*, of course; but at the same time... it went further than any other state before or since in institutionalizing territorial *nationhood* and ethnic *nationality* as fundamental social categories. In doing so it inadvertently created a political field supremely conducive to nationalism” [emphasis in original].<sup>70</sup> The communist period was thus imperative in further inculcating the modern nationalism of the Hungarian state, and was not, as some scholars contend, a period in which nationalism or even far-right tendencies, waned.

Fidesz as a political party—whose currently ideologies range from national conservatism, xenophobia, and far-right populism to economic nationalism—has also experienced a sharp turn

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<sup>69</sup> Örkény, Antal. "Hungarian National Identity: Old and New Challenges." *International Journal of Sociology* 35, no. 4 (2005): 28-48.

<sup>70</sup> R. Brubaker. *Nationalism Reframed: National Minorities, Nationalizing States, and External Homelands in the New Europe*. Budapest: Collegium Budapest, 1995: 17.

in its ideological character since its roots as an anti-communist liberal party in the late 1980s. Even when Fidesz was in power at the turn of the twenty-first century (from 1998-2002), Orbán ruled as a rather conventional conservative as prime minister, with a notably pro-European stance in light of current Fidesz rhetoric toward the European integration project and the Brussels bureaucracy. The *right-wing populist* Fidesz with which this study is concerned thus begins at the 2010 parliamentary elections, which saw the party (and its coalition partner, the KNDP) receive a supermajority in parliament. Iusmen (2015) explains that, “Within a short time span, the Hungarian ‘constitutional revolution’ steered by Fidesz’s leader and current Prime Minister Viktor Orban, entailed the adoption of a new constitution as well as 350 legislative bills that have radically overhauled the democratic architecture of the Hungarian state.”<sup>71</sup> Thus begins the right-wing populist consolidation of power and erosion of domestic democratic institutions in Hungary that can be described as nothing short of a slide towards authoritarianism.

Kelemen (2017) delineates the most worrisome instances of democratic backsliding since Fidesz’s election in 2010, and subsequent electoral victories in 2014 and 2018.

The principal effect of the changes introduced through this whirlwind of constitutional and statutory change was to concentrate power in the Orbán government’s hands. Through its new 2011 constitution (and subsequent amendments) and Cardinal Laws, the Orbán government has managed to eliminate previous constitutional checks and balances, asserting control over previously independent public bodies that might have checked the government’s power such as the ombudsman for data protection, the National Election Commission and the National Media Board. His regime has worked to muzzle the press, inducing media self-censorship by introducing new regulations that threaten journalists

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<sup>71</sup> Ingi Iusmen. "EU Leverage and Democratic Backsliding in Central and Eastern Europe: The Case of Romania." *JCMS: Journal of Common Market Studies* (2014): 603.

with penalties if regulators deem their content is not ‘balanced, accurate, thorough, objective and responsible’. Likewise, the government has attacked civil society organizations that had been critical of it. To ensure that Fidesz would retain control of the government in the April 2014 parliamentary elections and beyond, the Orbán government overhauled Hungary’s electoral system to favour Fidesz and otherwise manipulated advertising and campaigning rules to benefit itself, leading international election monitors to conclude that the 2014 elections were held under conditions that gave ‘an undue advantage’ to Fidesz.<sup>72</sup>

In addition replacement of the Hungarian constitution through an expedited process about which the parliamentary opposition had no input, an attack on civil society organizations, and a reform of electoral institutions that has ensured the Fidesz supermajority is maintained, the far-right populist government under Orbán also initiated an unprecedented attack on the judiciary starting in 2010—a playbook which was imitated by Polish populists beginning in 2015, and which will be discussed below. The Orbán assault on the independence of Hungary’s judicial bodies took three major forms. First, the government allowed for the appointment of judges without consulting the political opposition. Second, the 2011 constitution increased the membership on Hungary’s Constitutional Court by four judges, allowing for a court-packing scheme which ensured a majority of Fidesz partisans on the bench.<sup>73</sup> Third, a March 2013 law stripped the Constitutional Court of its power to review constitutional amendments on the basis of their content. And, similar to the Polish law which will be discussed in the following section, in 2012, the Fidesz-controlled parliament passed a law lowering the mandatory retirement age for federal judges from 70 to 62, effectively clearing judicial positions for subsequent appointment by the

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<sup>72</sup> R. Kelemen. “Europe’s Other Democratic Deficit,” 222.

<sup>73</sup> R. Kelemen. “Europe’s Other Democratic Deficit,” 222.

Fidesz supermajority.<sup>74</sup> On the basis of a law limiting the activities of foreign-funded organizations within its borders, Hungary also expelled the Central European University in Budapest, in a move that seemed to reflect the actions an authoritarian state more than a democracy. In short, as expressed by retired former member of the Hungarian parliament Zsuzsanna Szelényi, “Hungary is not a democracy anymore. The parliament is a decoration for a one-party state.”<sup>75</sup>

*Supranational Response.* In January 2012, the E.C. initiated infringement proceedings against Hungary on the basis of three Hungarian laws that violated E.U. legal agreements: one of which was the forced retirement of federal judges at the age of 62, which applied retroactively. However, despite the fact that the E.C.J. ruled in favor of the Commission in November 2013, claiming that that Hungary’s law did, in fact, violate European agreements on age discrimination in the workplace, the infringement cases initiated by the Commission have not been effective at preventing further backsliding at the hands of the Fidesz government. Using the Hungarian case as a springboard, Scheppele (2013) points to a critical weakness in the enforcement power of serialized infringement rulings. Blauberger and Kelemen (2017) explain that in Hungary:

... Rule of law and democracy are not swept away by one big wave, but are undermined incrementally by many small measures. Tackling each of these infringements in isolation, as the traditional infringement procedure would do, ignores the systemic pattern of abuse linking the infringements. Thus, the traditional case-by-case infringement procedure – even if it were deployed much more actively as we suggest above – could ultimately prove ineffective to safeguard the overall principles of rule of law and democracy. By

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<sup>74</sup> Ingi Iusmen. "EU Leverage and Democratic Backsliding in Central and Eastern Europe: The Case of Romania." 603.

<sup>75</sup> Beauchamp, Zach. "It Happened There: How Democracy Died in Hungary." *Vox*, September 13, 2018.

bundling individual violations, prosecuting them as ‘systemic infringements’ and withholding EU funds as a potential sanction, Scheppelle argues, the Commission would be in a better position to enforce systemic compliance.<sup>76</sup>

Scheppelle, Blauberger, and Kelemen therefore argue for a stronger enforcement mechanisms against democratic backsliding.

However, even after March 2014, when the Union passed the “Rule of Law Framework—a stricter legal enforcement mechanism to deal with Member State non-compliance with core E.U. values—the Commission still choose not to employ it against Hungary. Why the Commission has been so hesitant to use its legal tools to ensure Hungarian compliance and halt the march toward increasingly illiberal democracy is a puzzle that has yet to be explained by scholars. The following sections, which include a Poland case study and a comparative analysis of the two, strives to provide clarity.

## **Poland**

*A Brief History of Far-Right Populism in Poland.* Pankowski (2010) chronicles the history of both radical right-wing and populist movements in Poland, and one fact emerges very clearly from his historiography: far-right populism did not materialize in the twenty-first century in Poland, nor did it appear after the victory of Solidarity over the communist regime, nor did it ever experience a meaningful recession into the shadows of political life, as it did in Western Europe. Rather, far-right populism is a staple of Polish political culture. Three periods of history help to lay the groundwork for a Polish political culture fraught with anti-Semitism, xenophobia,

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<sup>76</sup> M. Blauberger, R. Daniel Kelemen. "Can Courts Rescue National Democracy?" 329.



and hyper-nationalism: the endek government in the inter-war period, Nazi occupation during World War II, and the dominance of Solidarity post-communism.

The earliest incidence of Polish far-right populism to which this study harkens back, in an attempt to contextualize the success of PiS today, is the National Democratic movement of the Second Republic, which lasted from 1918-1939. Founded by Roman Dmowski in opposition to the nascent socialist movement and conceptualization of Polish nationalism in broad multi-ethnic terms espoused by Józef Piłsudski, the endeks (as the National Democrats came to be known) believed “Polishness had to be defined in strictly ethnic terms and thus opposed not only to the occupying powers, Germany and Russia, but also to other groups, such as Jews, who had previously been considered part and parcel of the Polish nation.”<sup>77</sup> While National Democratic ideology oscillated between pro-Russian foreign policy, strict market capitalism, and social fascism, the radical ethno-nationalism of the endeks—and especially their anti-Semitism—endures.

The anti-German, anti-Russian, and most notably, anti-Ukrainian sentiment that prove central characteristics to Polish nationalism have roots centuries before World War II; however, the Nazi invasion in 1939 and subsequent six-year occupation by German forces proved an incendiary factor for nationalist forces in Poland. Unlike Vichy France—the far-right regime that collaborated with the Nazis within the geographical confines of their puppet state in Southern France and Northern Africa—Poland did not have a collaborationist state during the Second World War. It is not, however, due to the lack of an extreme right-wing presence in Poland at the time, as the potency of the ONR (National-Radical Camp), a endek offshoot with a radical Catholic-nationalist ideology, was clear in political life. Rather, Pankowski (2010) explains, the

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<sup>77</sup> Rafael Pankowski. *The Populist Radical Right in Poland: The Patriots*. (Routledge: London and New York, 2010), 22.

German occupation government “loathed the Poles as Slavs and preferred to rule Poland by sheer terror rather than by consent of the local population... Unlike in many other countries in occupied Europe, no Quisling-type leader emerged and no collaborationist government was formed in Poland, and thus the extreme right did not emerge from the war stained with national treason.”<sup>78</sup> In Norway, Vichy France, and Italy (whose governments were either collaborators with, or strong allies of Nazi Germany), and even in Germany itself, many extreme-right officials were brought to justice in the years following World War II, dismissed as both hateful and—more importantly—defeated. Far-right populist parties, therefore, did not see a resurgence until very recently in the aforementioned states, and the stigma surrounding these ideologies is still, for a portion of the populations, a source of national guilt. In Poland, however, such officials “emerged from the war, their prestige—and anti-Semitism—intact.”<sup>79</sup> In other words, such extreme nationalists *never ceased* having influence or a presence in Polish political life, even in the era of liberal internationalism post-World War II, which saw a dormancy of far-right populists in most of the West.

The eve of communism in Poland and the emergence of Solidarity is often regarded as a victory for the liberal, democratic ideas of the West. However, right-wing populism was always present in the multi-ideological coalition that was Solidarity, and it did not take long after Poland left the Eastern bloc for Solidarity’s more extreme far-right members to emerge. Pankowski (2010) explains that Solidarity, at its core, was a populist, nationalist movement, as it “symbolically aspires to speak on behalf of ‘the people,’” and “it was the nation rather than any other entity that was the prism through which Solidarity activists looked at the social universe.”<sup>80</sup>

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<sup>78</sup> Rafael Pankowski. *The Populist Radical Right in Poland: The Patriots*, 37.

<sup>79</sup> K. Gebert. *Living in the Land of Ashes*. Krakow: Austeria Publishing House, 2008.

<sup>80</sup> R. Pankowski. *The Populist Radical Right in Poland: The Patriots*, 60-61.

Neither of these qualities are innately damaging to liberal democracy, and Solidarity was undoubtedly instrumental in ensuring that pluralistic liberal democracy emerged in Poland after 1989. But festering economic discontentment and deepening social inequality resulting from neo-liberal market reforms under Lech Wałęsa did prompt a hasty reappearance of the far-right in the 1990s. Pankowski (2010) writes, “An extreme example of Solidarity’s turn to the national populist discourse in the 1990s was the rise of Zygmunt Wrzodak, the union leader at the Warsaw-Ursus tractor factory who used particularly inflammatory rhetoric portraying ‘liberals, foreigners, and Jews’ as being ‘the root of all evil.’”<sup>81</sup> Wrzodak’s brand of populist, anti-Semitic, Catholic-nationalism is evident in a 1997 speech to his workers, when he stated, “It is thanks to you, the Catholic workers of the Ursus factory, thanks to your faith, strength and perseverance that the Polish tractor is produced in Poland, which works the Polish fields so that Polish bread can appear in our Polish homes.”<sup>82</sup>

The history of far-right populism in Poland is, to say the least, entrenched in conceptions of nationhood and self. Yet the macroeconomic success of the country after the fall of communism seemed to signal to scholars that Poles would remain content with their pluralistic form of government. Accession in 2004 to a Union of democracies committed to the “indivisible, universal values of human dignity, freedom, equality and solidarity... based on the principles of democracy and the rule of law, [which] places the individual [and not the nation-state] at the heart of its activities,”<sup>83</sup> made Poland’s democratic success seem even more irreversible. However, the legacies of the twentieth century laid the groundwork for a resurgence of ideologies and political styles once naively deemed extinct.

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<sup>81</sup> Ibid, 78.

<sup>82</sup> Ibid, 78.

<sup>83</sup> Preamble, Charter of Fundamental Rights of the European Union, 2000.

*PiS in Power: Overview of the Domestic Crisis.* The first notable victory of far-right populism in Polish elections in the twenty-first century was the PiS - LPR - Self-Defense coalition government headed by Kaczyński, which was in power from 2005-2007. These years, while not extremely consequential vis-à-vis populist or right-wing policy changes, did help lay the groundwork for the further extremifying of the Polish electorate and political parties. “The perception of extremists entering the political mainstream was widespread,” Pankowski (2010) explains, and the rhetorically-driven, hyper-nationalist, anti-liberal effect on Polish life is lasting. With regards to the pointedly anti-liberal stance of PiS in 2006, Pankowski (2010) says, “One of the earliest decisions of the PiS in power was to abolish the government’s Commissioner for the Equal Status of Women and Men, an office which had been in charge of state anti-discrimination policies in various fields, including ethnicity, race, and sexual orientation.”<sup>84</sup> Due to this clear breach in Poland’s treaty obligations pertaining to the European Union Race Equality Directive, the trend of Law and Justice’s non-compliance began a decade before the most recent election in which PiS took power.

More recently, in the parliamentary elections of October 2015, the nationalist, right-wing populist Law and Justice party won 51% of seats in the Sejm, placing Kaczyński back at the helms of power, albeit not immediately the prime ministership. Soon after taking office, PiS initiated a constitutional crisis in Poland that lasts to the current day. There are four major reforms the PiS government attempted to enact in order to consolidate power and further entrench themselves in the highest echelons of the Polish state. First, PiS under President Andrzej Duda tried to pass legislation that would politicize the Constitutional Tribunal (Poland’s highest constitutional court) by enabling a court-packing scheme. Second, the onslaught on the

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<sup>84</sup> R. Pankowski. *The Populist Radical Right in Poland: The Patriots*, 175.

independence of the Constitutional Tribunal continued when parliament attempted to pass legislation that would require: [a] 13 of 15 judges to be present in order to hear a case, [2] a two-thirds majority of concurring opinions in order for a ruling to be made, and [3] the Tribunal to hear cases in the order they arrive—removing the Court’s ability to prioritize cases of importance and *de facto* preventing the Court from making rulings about the constitutionality of PiS’ reforms for years to come. Third, regarding the Supreme Court, the PiS-majority Sejm passed a law lowering the retirement age of Supreme Court judges from 70 to 65, which would have forced 27 out of 72 sitting judges to retire, allowing Duda to fill the court with partisan PiS loyalists. Finally, the Law and Justice government—which has remained in power since 2015—also attempted to politicize the free press and keep it under partisan control, as new laws reallocated the management of public television and radio from the independent Public Broadcasting Council to the Duda-appointed treasury minister, a move which led to the subsequent firing of current management unsympathetic to the right-wing populist cause, and a filling of media positions with PiS partisans.<sup>85</sup>

*Supranational Response.* As Kelemen (2017) argues, and as infringement case data proves, the E.U. responded—at least relative to responses to Hungary’s backsliding—rather swiftly to Polish attempts to undermine the independence of the judiciary and the viability of a free press. Kelemen (2017) states, “While the European Commission has refused to deploy the Rule of Law Framework procedure against Hungary since it was created in 2014, it launched the procedure against the Polish government in January 2016, less than two months after PiS had launched its attacks on the judiciary and the media.” With regards to infringement cases, the E.C. also referred Poland to the E.C.J. in September of 2018 due to the forced retirement of Supreme

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<sup>85</sup> R. Kelemen. “Europe’s Other Democratic Deficit,” 228.

Court judges, which the E.C. maintains “is incompatible with EU law as it undermines the principle of judicial independence, including the irremovability of judges.”<sup>86</sup> The referral comes after a Letter of Formal Notice and Reasoned Opinion were sent to the Polish government in July and August of 2018, respectively, with no progress made to reinstate the rule of law and separation of powers.

The most important part of the E.U.’s legal response to Poland’s judicial crisis is the E.C.J.’s interim injunction that was approved days after the referral of the infringement case to the court by the Commission. The injunction was permitted by the E.C.J., as it recognized that “suspending application of the Law on the Supreme Court was urgent because the government was in the process of carrying out a ‘profound and immediate change in the composition of the Supreme Court’ that might irreparably damage the fundamental right to a fair trial before an independent court or tribunal.”<sup>87</sup> The Polish government was thus given a month to plan for compliance with E.U. obligations, and on November 21st, 2018, the government surrendered in the standoff. Amendments to the original forced-retirement law were pushed through the PiS-controlled Sejm, judges were allowed to reenter their posts, and the independence of the judiciary was restored.<sup>88</sup> In short—despite a three-year-long supranational legal standoff between a far-right populist government and the European Union—the rule of law was maintained in Poland, and the existing legal architecture within the E.U. to ensure compliance *worked*.

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<sup>86</sup> European Commission. "Rule of Law: European Commission Refers Poland to the European Court of Justice to Protect the Independence of the Polish Supreme Court." News release, September 24, 2018.

<sup>87</sup> Kelemen, R. Daniel, and Laurent Pech. "Poland’s Plan to Get Rid of Independent Judges Has Just Hit a Roadblock." *Monkey Cage*, October 25, 2018.

<sup>88</sup> Jan van Zyl Smit, “After Poland’s attempted purge of ‘Communist-era’ judges, do we need new international standards for post-authoritarian countries reforming their judiciary?” *IACL-AIDC Blog* (25 January 2019).

### Case Closed? Most Similar Systems and the *De Jure* Constitutionality of Reforms

The previous two subsections outline the twentieth-century histories of right-wing populism in Hungary and Poland, the contemporary history of Fidesz and PiS-initiated backsliding, and the supranational institutional response of the E.U. in its attempts to rein in the democratic erosion orchestrated by parties at the helms of national power in C.E.E. Member States. The similarities between Hungary and Poland's "playbooks" for achieving backsliding are not only noted by academics, however. Polish leaders *themselves* have explicitly articulated that their political goal is to mimic the democratic erosion achieved by Fidesz in Hungary. Kaczyński stated, "Viktor Orbán gave us an example of how we can win. The day will come when we will succeed, and we will have Budapest in Warsaw."<sup>89</sup> Other similarities between the Poland and Hungary cases include both Orbán and Kaczyński rhetorically casting themselves as the leaders of the fight against an "oppressive" Western liberalism, both states harboring "a history of hostility especially towards Ukrainians and Romanians, [despite the fact that] both states are playing well with their neighbors to the east," and both states being bitterly polarized, despite high levels of ethnic and religious homogeneity.<sup>90</sup> Seven important similarities between the cases, which provide the foundation for the most similar systems investigation, are summarized in Table 2.

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<sup>89</sup> Buckley, Neil, and Henry Foy. "Poland's New Government Finds a Model in Orbán's Hungary." *Financial Times*, January 6, 2016.

<sup>90</sup> Case, Holly. "Shape Shifting Illiberalism in East-Central Europe," 112.

Table 2

	Country	
	Hungary	Poland
Year of E.U. Accession	2004	2004
Polarization in Society	High	High
Ethnic homogeneity	83.7% ethnic Hungarians	96.9% ethnic Poles
Historical Self-Definition	Hyper-nationalist; in opposition to Romania	Hyper-nationalist; in opposition to Germany, Russia, and Ukraine
Playbook of Power Consolidation	Undermine Judiciary, compromise free press	Undermine Judiciary, compromise free press
Trend in Incidence of Infringement Procedures Since Election of Far-Right Populists	Downward	~ Downward
Trend in Incidence of Preliminary Ruling Procedures Since Election of Far-Right Populists	Upward	~ Upward

*Points of Divergence Between the Cases.* As outlined in Table 2 above, the histories of Poland and Hungary, as well as their ethnic homogeneity, entrenched right-wing nationalist traditions, and post-accession incidence of non-compliance as indicated by infringement proceedings and preliminary references, are strikingly similar. In order to attribute potential causation according to the Mill's Method of Difference, the few diverging characteristics between the case studies need to be identified and tested in order to determine which best explains the divergent outcome—in our case, differing supranational institutional responses to



backsliding. Three large points of divergence emerge which may help to illuminate why the E.C. and was so willing to bring infringement cases against Poland, but more hesitant in charging Hungary with breaches in legal obligation. They are as follows: [1] the population and relative strategic importance of Poland over Hungary, [2] the European parliamentary party identification of Fidesz versus that of PiS, and [3] the *de jure* constitutionality of the reforms initiated by each party in order to consolidate power. The third, this study argues, is the most convincing.

Poland has a population of over 38.43 million. Hungary's population total amounts to less than 25% of Poland's, comprising of only 9.78 million. Thus, based upon E.U. ideological foundation emphasizing the individual—outlined in the Preamble of the Charter of Fundamental Rights of the European Union<sup>91</sup>—and given the strain placed on the E.U.'s institutional capacity in the wake of the European sovereign debt crisis—outlined by Blauberger and Kelemen (2017)<sup>92</sup>—it is only logical that the European Commission would channel its limited resources into combatting the backsliding affecting *more* individual European citizens, and prosecute Poland more heavy-handedly for its backsliding. This theory, however, fails to hold against further scrutiny. If population is a major factor affecting the E.C.'s decision to initiate infringement proceedings against a Member State, why has the Commission been, thus far, unwilling to charge the Italian *Lega* and M5S coalition for their alleged or suspected breaches of E.U. law? Italy's current governing coalition is undoubtedly populist in nature, the *Lega* fulfills the requisite "far-right" characteristic, and Italy's population is greater than Poland's by over 20 million. However, the E.C. has only initiated ten infringement proceedings since the formation of

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<sup>91</sup> "... the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. *It places the individual at the heart of its activities*, by establishing the citizenship of the Union and by creating an area of freedom, security and justice" [emphasis added by author].

<sup>92</sup> M. Blauberger, R. Daniel Kelemen. "Can Courts Rescue National Democracy?" 323-4.

the Salvini-DiMaio government in June of 2018—a *far* fewer number than the proceedings brought against both Poland and Hungary during the same time frame.<sup>93</sup> Thus, the populations of Member States ruled by far-right populist parties infringing upon treaty obligations is clearly not a large factor in the decision-making of the Commission, and population alone cannot explain the eagerness with which the E.C. prosecuted Poland, and not Hungary, for breaches.

A second point of divergence which may help to explain the varied supranational legal response is the political protection afforded to Fidesz at the international level that is *not* afforded to PiS as a result of their different European parliamentary party associations. Kelemen (2017) contends that the Commission has responded less forcefully to the rule of law being undermined in Hungary—a contrast to the swift legal actions taken against Poland—because Orbán and Fidesz have powerful allies within the European People’s Party group (EPP) that help to represent Fidesz’s interests in all institutional chambers of the Union and insulate it from the harshest legal consequences. He explains, “The EPP group is the largest faction in the European Parliament, is well represented in the Commission, and governments led by EPP member play a leading role in the European Council. By contrast, PiS belongs to the far smaller eurosceptic party – the ECR. The ECR has a marginal influence on law-making in the European Parliament and only two ECR-led governments are represented in the Council – those of Poland’s PiS and the UK’s Conservative Party.”<sup>94</sup> Kelemen points to European parliamentary politics as the strongest explanation for the divergent treatment of Poland and Hungary. However, the EPP group has not afforded similar protections to their members such the Croatian Democratic Union (HDZ), which leads the governing coalition in the Sabor (Croatian Parliament) and controls the Croatian presidency. This is evident in the fact that the number of infringement cases brought

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<sup>93</sup> "European Commission at Work: Infringement Decisions." March 7, 2019.

<sup>94</sup> R. Kelemen. “Europe’s Other Democratic Deficit,” 229-230.

against Croatia has rapidly increased from four in the year of Croatia's accession (2013) to 33 in 2017.<sup>95</sup> Similarly, infringement proceedings brought against Bulgaria spiked in 2014, the year that the Citizens for European Development of Bulgaria (GERB)—a conservative, populist EPP group-member—won a plurality in the Bulgarian parliament and formed a government, and have remained high as GERB continues gaining electorally. Thus, if Fidesz receives preferential political defense from the EPP group, it is an anomaly and thus unhelpful in generalizing theory.

A final point of dissimilarity between the rise of far-right populist parties in Poland and Hungary is the “on-paper” constitutionality of the reforms being initiated. Despite strikingly parallel strategies of backsliding, and admissions by Polish political leaders that their intention was to duplicate Fidesz's “success” in dismantling the separation of powers in Hungary, the hard legality of the processes were *not* identical. Kelemen (2017) suggests:

... the Polish case differed from the Hungarian in one important respect: while the Orbán government had the legislative supermajority it needed to amend its country's constitution, the requirements for constitutional amendment in Poland were more demanding and the PiS government has been unable to push through constitutional amendments. This meant that the Orbán government could render any of its actions ‘constitutional’ simply by amending the constitution, where the PiS has blatantly to disregard the rule of law and defy its own Constitutional Tribunal to achieve its aims.<sup>96</sup>

Kelemen then speculates that the *de jure* constitutionality factor is not as important as other aforementioned theories in elucidating why the E.C. responded in such a divergent manner to

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<sup>95</sup> Sekularac, Ivana, and Igor Ilic. "Conservatives Take Lead in Croatia Election." *Reuters*, September 11, 2016.

<sup>96</sup> R. Kelemen. “Europe's Other Democratic Deficit,” 229.

slippages toward authoritarianism in Poland and Hungary; however, this study hypothesizes that constitutionality *is* the major deciding factor in the Commission's decision-making.

Theoretically, the E.U.'s legal apparati exist to uphold the rule of law; numerous treaties and charters outline and re-emphasize the importance of the rule of law to the integrative ideological fabric of the Union, and the rule of law is prioritized alongside "the inviolable and inalienable rights of the human person, freedom, democracy, [and] equality" in the 1992 Maastricht Treaty.<sup>97</sup> The unfortunate truth for those hoping to thwart the onslaught of assaults on democratic institutions in Hungary at the hands of right-wing populists is that, on purely constitutional grounds, most of the reforms initiated by Fidesz did not technically violate the rule of law in Hungary. There are many reasons to argue that Hungary is *de facto* undermining both the rule of law and democratic institutions, and many scholars have done so. Rohac (2018) explains the skewed electoral system that, since 2012, has provided an unfair advantage to Fidesz. The electoral law, he explains, "changed the rules of the game in Fidesz's favour by redistricting the country and increasing the number of single-mandate constituencies in which the largest party enjoyed a natural advantage over its challengers."<sup>98</sup> The new law thus allowed Fidesz to capture 68% of the seats in the Hungarian National Assembly despite only receiving 53% of votes in the most recent election. But the fact remains that, no matter how damaging the actions of Fidesz are for the rule of law in Hungary, how much they chip away at the civil liberties of Hungarian citizens, the reforms do not violate Hungary's constitution. Kelemen (2017) makes clear that, "With a two-thirds supermajority in parliament, Orbán had the authority to push through institutional reforms that consolidated his grip on power... the Orbán

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<sup>97</sup> European Union, *Treaty on European Union (Consolidated Version)*, *Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002.

<sup>98</sup> Rohac, Dalibor. "Hungary's Opposition Faces an Uphill Battle against Authoritarianism." *CapX: Centre for Policy Studies*, April 17, 2018.

government first amended and then after a year in office completely replaced the existing constitution.”<sup>99</sup>

In Poland, however, domestic electoral victories were never large enough to provide Law and Justice with a sufficient majority in the Sejm to amend the constitution. Thus, the PiS government “blatantly violate[d] its own constitutional order” in [1] attempting to pack the Constitutional Tribunal with PiS loyalists, [2] refusing to abide by the Tribunal’s rulings, and [3] passing legislation that politicized the Public Broadcasting Company under the control of the PiS treasury minister.<sup>100</sup> The swift E.U. response to the unconstitutional actions of the PiS government are outlined in the previous subsection. Another instance of the European Union being quick to prosecute non-compliance on the basis of a Member State breaching its own domestic constitutional order was the Romanian Prime Minister’s unilateral decision in 2012 to impeach the sitting president, Traian Băsescu. For the reasons outlined in the section entitled, “Research Design and Operationalization of Variables,” most notably the existence of the Cooperation and Verification Mechanism (C.V.M.) that is particular to the Romanian case, the intervention against Romania’s left-wing populist parliamentary rulers is not perfectly comparable to the Poland and Hungary cases. However, despite the fact that the E.C. deployed legal tools made available to them by the C.V.M., as opposed to infringement proceedings, the supranational institutional response was nevertheless firm and fast. Not only did Commission President Barroso order the Ponta government to cease their referendum law changes and abide by the 11 “commandments” outlined by the Commission, there was also [1] a strong condemnation by European Parliament (on both ends of the political spectrum) and [2] the July 2012 C.V.M. report, which accused Romania of being slow to enact judicial and anti-corruption

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<sup>99</sup> R. Kelemen. “Europe’s Other Democratic Deficit,” 221.

<sup>100</sup> Ibid, 228.

reform, specifically referencing Bănescu's attempted impeachment.<sup>101</sup> More important than the firmness and swiftness of the Union's reaction was its effectiveness. Given Romania's forced adherence to its previous laws regarding quorum in referenda, the attempt to impeach President Bănescu failed, and the rule of law was upheld. The E.U.'s 2012 intervention in Romania, like Poland to date, thus represents an instance of the E.U.'s willingness to combat backsliding in a Member State violating its *own* domestic constitution—as well as the effectiveness it promises in protecting democracy.

In conclusion, the case studies suggest that, more so than the population of a Member State, the potency of a ruling party's political allies in European Parliament, or even the incidence of infringements being committed, a Member State's compliance with their *own* domestic constitution seems to be the most important factor when the E.C. decides whether or not to file infringement proceedings to counteract democratic backsliding in C.E.E. states ruled by right-wing populists. And in the case where infringements are being prosecuted (i.e. Poland), the legal-institutional framework seems to be working.

## **QUO VADIS, EUROPEAN UNION? ASSESSING THE THREAT FROM RIGHT-WING POPULISM IN C.E.E.**

This study sought not to test an existing theory. Rather, it hoped to challenge a dominant narrative in conversations about the rise of far-right populism in C.E.E., which assumes, without rigorous academic testing, that the rise of said parties will inevitably damage the E.U.'s legal apparati. The parallel investigations of [1] prosecution of Member States over time and [2] a comparative case study of Poland and Hungary expand a contending view in the literature that is

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<sup>101</sup> Iusmen, Ingi. "EU Leverage and Democratic Backsliding in Central and Eastern Europe: The Case of Romania." *JCMS: Journal of Common Market Studies* (2014): 596-7.

currently understated: the legal-institutional architecture of the E.U. is doing precisely what it was designed to do. Far from being undermined by the appearance of right-wing populists in C.E.E., the supranational legal tools at the disposal of the E.U. are proving themselves functional and resilient in the face of pressure. Unlike the extremely technical environmental and economic infringements that dominated the E.C.J.'s legal channels in the years before the global financial crisis, the rule of law infringements being brought against C.E.E. Member States, especially Poland, prove that the institutional architecture can remain effective in the face of higher-consequence non-compliance—even the violation of fundamental values upon which the E.U. is founded.

The next subsection will explore the theoretical implications of the study for international organizations, and for what scholars should conceptually prioritize about institutional functioning. The final subsection will expand the geographical scope of the implications, most notably to the United States.

*Ideas or Processes? Theoretical Consequences for International Institutionalism.* If this study has any theoretical impact, it's that institutions are, at their most basic, a series of procedures. It is undoubtedly uncomfortable for the designers of an institutions when its foundational ideals are challenged; however, one implication of this study is the theoretical notion that the gravitas of an institution—whether on the national or supranational level—lies in the resilience of its institutional architecture, not the rhetorical adherence of every party to the organization's idealized norms. Scheppele, Pent, and Kelemen (2018) claim:

The progressive destruction of law by arbitrariness – rule of law rot – will eventually undermine the entire European project if it is not caught and treated... The EU is facing an existential crisis because Member governments refuse to recognize that the common

values are the cornerstones of their common project. Democracy, human rights and the rule of law are more than simply normative aspirations; they are in fact central to the operation of the European Union. If the EU fails to defend its common values, the EU won't merely fail as a normative project, it will cease to function.<sup>102</sup>

However, “democracy, human rights and the rule of law” *are* simply normative aspirations. Ideas themselves, while informing the general character of an institution, do not necessarily affect an institution's operation. It is the laws and processes *upholding* those values that are central to the European Union as an organization.

Regardless of PiS and Fidesz's rhetoric, and the domestic executive aggrandizement that both party's leaders pursued in their home countries, the fact remains that—when employed—the E.U.'s infringement prosecution architecture has *worked* as intended. In Hungary, where the Commission was less inclined to intervene to maintain democracy and the rule of law, the judiciary remains under the control of the ruling party, Fidesz. In Poland, however, where the E.C. did intervene forcefully, plans to undermine the independence of the judiciary have, thus far, been stalled, and the rule of law restored.

*Transatlantic Insinuations: Trump and the American Rule of Law.* The conclusion of this study is notably speculative—as the events being analyzed are evolving in real time.

Nevertheless, its findings have ramifications beyond Europe. In the United States, for example, where scholars have warned about the potential for democratic backsliding under the Trump administration, no major institutional reforms were achieved that imperiled the rule of law, even for the first two years of the Trump presidency when the Republican Party controlled both

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<sup>102</sup> Scheppele, Kim Lane, Laurent Pech, and R. Daniel Kelemen. "Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU Budget-related Rule of Law Mechanism." *Verfassungsblog: On Matters Constitutional* (blog), November 12, 2018.



chambers of Congress, the White House, and 33 governors' mansions. For example, Mickey, Levitsky, and Way (2017) caution, "... One [should not] expect the Constitution on its own to impede backsliding. As the constitutional scholars Tom Ginsburg and Aziz Huq have argued, the ambiguities of the U.S. Constitution leave considerable room for executive abuse on various fronts, including the ability to pack government agencies with loyalists and appoint or dismiss U.S. attorneys for political reasons. In the absence of informal norms of restraint and cooperation, even the best-designed constitution cannot fully shield democracy."<sup>103</sup> The U.S. Constitution *has*, however, proven resilient in light of the Trump administration's inclination toward authoritarian tendencies and onslaughts against the separation of powers. The institutions of American democracy—Congress' power of the purse and an independent Supreme Court for example—are functioning as designed. In short, and similarly to the European Union, concerns about the system's demise in light of challenges may be overstated.

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<sup>103</sup> Mickey, Levitsky, and Way. "Is America Still Safe for Democracy?" May/June 2017.

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